No. 98-85-ATX Title: James B. Hunt, Jr., Governor of North Carolina, et al., Appellants
v.
Martin Cromartie, et al.

Docketed:
July 16, 1998 Court: United States District Court for the Eastern District of North Carolina

Entry	Date	Proceedings and Orders
	Jan 11 1998	Letter from counsel for the petitioner received and distributed.
	May 27 1998	Application (A97-893) to extend the time to file a jurisdictional statement on appeal from June 7, 1998 to June 18, 1998, submitted to The Chief Justice.
	May 29 1998	Application (A97-893) granted by the Chief Justice extending the time to file until July 6, 1998.
	Jul 6 1998	Statement as to jurisdiction filed. (Response due August 31, 1998)
	Jul 23 1998	Order extending time to file response to jurisdictional statement until August 31, 1998.
	Aug 26 1998	Motion of appellees Martin Cromartie, et al. to dismiss or affirm filed.
	Aug 26 1998	LODGING consisting of ten copies of Session Law 1077-11 and ten copies of Session Law 1998-2 submitted by counsel for the respondents
	Aug 28 1998	LODGING consisting of one set of maps, nos. 1-10, submitted by counsel for the respondents
	Sep 9 1998	DISTRIBUTED. September 28, 1998
	Sep 18 1998	Reply brief of appellants James Hunt, Governor of North Carolina, et al. filed.
	Sep 29 1998	PROBABLE JURISDICTION NOTED. The brief of appellants is to be filed with the Clerk and served upon opposing counsel or or before 3 p.m., Tuesday, November 10, 1998. The brief of appellees is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Tuesday, December 8, 1998. A reply brief, if any, is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Tuesday, December 29, 1998. Rule 29.2 does not apply. SET FOR ARGUMENT January 20, 1999. **********
	Oct 2 1998	Motion of Alfred Smallwood, et al. for leave to intervene as appellants in this Court filed.
	Oct 13 1998	DISTRIBUTED. October 16, 1998 (Page 12)
	Oct 13 1998	Brief of appellants in support of the motion of Smallwood, et al. for leave to intervene filed.
	Oct 19 1998	Motion of Alfred Smallwood, et al. for leave to intervene as appellants in this Court GRANTED.
	Nov 9 1998	Brief amicus curiae of ACLU filed.
	Nov 9 1998	Brief amicus curiae of United States filed.
	Nov 10 1998	Brief amicus curiae of Lawyers' Committee for Civil Rights Under Law filed.
	Nov 10 1998	Brief amici curiae of Corrine Brown, Congresswoman, et al. filed.

No. 98-85-ATX

Entry	Date	Proceedings and Orders
	Nov 10 1998	Brief of appellant -Intervenors filed.
	Nov 10 1998	Brief amici curiae of Brennan Center for Justice at NYU School of Law, et al. filed.
	Nov 10 1998	Brief of appellants Hunt, Gov. of NC, et al. filed.
	Nov 12 1998	Joint appendix filed.
	Nov 30 1998	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
	Dec 2 1998	Record filed.
	Dec 4 1998	CIRCULATED.
	Dec 8 1998	Brief of appellees Martin Cromartie, et al. filed.
	Dec 8 1998	LODGING consisting of twenty sets of four maps submitted by counsel for the appellees received and distributed.
	Dec 14 1998	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
	Dec 28 1998	Reply brief of appellant -Intervenors filed.
	Dec 29 1998	Reply brief of appellants James B. Hunt, Jr., et al. filed.
	Dec 31 1998	LODGING consisting of four exhibit size maps of the 1992 and 1997 North Carolina congressional redistricting plans submitted by counsel for appellees.
	Jan 20 1999	ARGUED.

Supreme Court, U.S.
FILED
98 85 JUL 6 - 1998

No. 97-893

In the

Supreme Court of the United States

October Term, 1997

JAMES B. HUNT, JR., in his official capacity as Governor of the State of North Carolina, *et al.*,
Appellants,

v.

MARTIN CROMARTIE, *et al.*,
Appellees.

On Appeal from the United States District Court
Eastern District of North Carolina

JURISDICTIONAL STATEMENT

MICHAEL F. EASLEY
North Carolina Attorney General

Edwin M. Speas, Jr.*, Chief Deputy Attorney General
Tiare B. Smiley, Special Deputy Attorney General
Melissa L. Saunders, Special Counsel to Attorney General

North Carolina Department of Justice
Post Office Box 629
Raleigh, North Carolina 27602-0629
Telephone: (919) 716-6900

July 6, 1998

*Counsel of Record

QUESTIONS PRESENTED

1. In a racial gerrymandering case, is an inference drawn from the challenged district's shape and racial demographics, standing alone, sufficient to support summary judgment for the plaintiffs on the contested issue of the predominance of racial motives in the district's design, when it is directly contradicted by the affidavits of the legislators who drew the district?

2. Does a final judgment from a court of competent jurisdiction, which finds a state's proposed congressional redistricting plan does not violate the constitutional rights of the named plaintiffs and authorizes the state to proceed with elections under it, preclude a later constitutional challenge to the same plan in a separate action brought by those plaintiffs and their privies?

3. Is a state congressional district subject to strict scrutiny under the Equal Protection Clause simply because it is slightly irregular in shape and contains a higher concentration of minority voters than its neighbors, when it is not a majority-minority district, it complies with all of the race neutral districting criteria the state purported to be following in designing the plan, and there is no *direct* evidence that race was the predominant factor in its design?

This page intentionally left blank.

LIST OF PARTIES

JAMES B. HUNT, JR., in his official capacity as Governor of the State of North Carolina, DENNIS WICKER in his official capacity as Lieutenant Governor of the State of North Carolina, HAROLD BRUBAKER in his official capacity as Speaker of the North Carolina House of Representatives, ELAINE MARSHALL in her official capacity as Secretary of the State of North Carolina, and LARRY LEAKE, S. KATHERINE BURNETTE, FAIGER BLACKWELL, DOROTHY PRESSER and JUNE YOUNGBLOOD in their capacity as the North Carolina State Board of Elections, are appellants in this case and were defendants below;

MARTIN CROMARTIE, THOMAS CHANDLER MUSE, R. O. EVERETT, J. H. FROELICH, JAMES RONALD LINVILLE, SUSAN HARDAWAY, ROBERT WEAVER and JOEL K. BOURNE are appellees in this case and were plaintiffs below.

This page intentionally left blank.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

LIST OF PARTIES iii

TABLE OF AUTHORITIES vii

OPINIONS BELOW 1

JURISDICTION 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 2

A. THE 1997 REDISTRICTING PROCESS. 2

B. THE 1997 PLAN. 3

C. LEGAL CHALLENGES TO THE 1997 PLAN. 6

1. The Remedial Proceedings in *Shaw*. 6

2. The Parallel *Cromartie* Litigation 8

D. THE THREE-JUDGE DISTRICT COURT'S OPINION 9

E. THE 1998 INTERIM PLAN. 11

ARGUMENT 12

I. SUMMARY JUDGMENT ISSUE. 12

II. PRECLUSION ISSUE. 16

III. PREDOMINANCE ISSUE. 20

CONCLUSION 30

TABLE OF AUTHORITIES

CASES

Ahng v. Allsteel, Inc., 96 F.3d 1033 (7th Cir. 1996) 17

Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986) 13,14,15,16

Bush v. Vera, 517 U.S. 952 (1996) ..... *passim*

Celotex Corp. v. Catrett, 477 U.S. 317 (1986) 13

Chase Manhattan Bank, N.A. v. Celotex Corp., 56 F.3d 343 (2d Cir. 1995) 17

Cromwell v. County of Sac, 94 U.S. 351 (1876) 18

Edwards v. Aguillard, 482 U.S. 578 (1987) 14,16

Federated Dep't Stores, Inc. v. Moitie, 452 U.S. 394 (1981) 18,19

Gaffney v. Cummings, 412 U.S. 735 (1973) 22

Gonzalez v. Banco Cent. Corp., 27 F.3d 751 (1st Cir. 1994) 17

Illinois v. Krull, 480 U.S. 340 (1987) 12

Jaffree v. Wallace, 837 F.2d 1461 (11th Cir. 1988) 17

Johnson v. Mortham, 915 F. Supp. 1529 (1995) 15

Karcher v. Daggett, 462 U.S. 725 (1983) 22

Lawyer v. Justice, 117 S. Ct. 2186 (1997) 21,24,25,27,28

McDonald v. Board of Election Commr's of Chicago, 394 U.S. 802 (1969) 12

Miller v. Johnson, 515 U.S. 900 (1995) ..... *passim*

Mueller v. Allen, 463 U.S. 388 (1983) 12

Nordhorn v. Ladish Co., 9 F.3d 1402 (9th Cir. 1993) 17

Price Waterhouse v. Hopkins, 490 U.S. 228 (1989) 14,28

Quilter v. Voinovich, 981 F. Supp. 1032 (N.D. Ohio 1997), affd, 118 S. Ct. 1358 (1998) 24,25,26,27,28

Reynolds v. Sims, 377 U.S. 533 (1964) 22

Rostker v. Goldberg, 453 U.S. 57 (1981) 12

Royal Ins. Co. of Am. v. Quinn-L Capital Corp., 960 F.2d 1286 (5th Cir. 1992) 17

Shaw v. Hunt, 517 U.S. 899 (1996) 2,15,21,26

Shaw v. Reno, 509 U.S. 630 (1993) 3,15,20,24,25,28

Starceski v. Westinghouse Elec. Corp., 54 F.3d 1089 (3d Cir. 1995) 14

United States v. Hays, 515 U.S. 737 (1995) 7

Voinovich v. Quilter, 507 U.S. 146 (1993) 25

Wise v. Lipscomb, 437 U.S. 535 (1978) 25

STATUTES AND OTHER AUTHORITIES

28 U.S.C. §1253 2,19

28 U.S.C. § 2284(a) 19

1998 N.C. Sess. Laws, ch. 2, § 1.1 11

18 JAMES WM. MOORE, ET AL., MOORE'S FEDERAL PRACTICE § 131.40[3][e][I][B] (3d ed. 1997) 19

18 C. WRIGHT, ET AL., FEDERAL PRACTICE AND PROCEDURE § 4457 (1981) 19

This page intentionally left blank.

No. 97-893

In the

Supreme Court of the United States

October Term, 1997

JAMES B. HUNT, JR., in his official capacity as Governor of the State of North Carolina, *et al.*,
Appellants,

v.

MARTIN CROMARTIE, *et al.*,
Appellees.

On Appeal from the United States District Court Eastern District of North Carolina

JURISDICTIONAL STATEMENT

Governor James B. Hunt, Jr., and the other state defendants below appeal from the final judgment of the three-judge United States District Court for the Eastern District of North Carolina, dated April 6, 1998, which held that the congressional redistricting plan enacted by the North Carolina General Assembly on March 31, 1997, was unconstitutional and permanently enjoined appellants from conducting any elections under that plan.

OPINIONS BELOW

The April 14, 1998, opinion of the three-judge district court, which has not yet been reported, appears in the Appendix to this jurisdictional statement at 1a.

JURISDICTION

The district court's judgment was entered on April 6, 1998. On April 8, 1998, appellants filed an amended notice of appeal to this Court. The jurisdiction of this Court is invoked under 28 U.S.C. § 1253.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This appeal involves the Equal Protection Clause of the Fourteenth Amendment and Rule 56 of the Federal Rules of Civil Procedure, Summary Judgment. *See* App. 169a & 171a-173a.

STATEMENT OF THE CASE

A. THE 1997 REDISTRICTING PROCESS.

In *Shaw v. Hunt*, 517 U.S. 899 (1996) (*Shaw II*), this Court held that District 12 in North Carolina's 1992 congressional redistricting plan ("the 1992 plan") violated the Equal Protection Clause because race predominated in its design and it could not survive strict scrutiny. On remand, the district court afforded the state legislature an opportunity to redraw the State's congressional plan to correct the constitutional defects found by this Court, and the legislature established Senate and House redistricting committees to carry out this task.

In consultation with the legislative leadership, the committees determined that, to pass both the Democratic-controlled Senate and the Republican-controlled House, the new plan would have to maintain the existing partisan balance in the State's congressional delegation (a six-six split between Democrats and Republicans). Toward that end, the committees sought a plan that would preserve the partisan cores of the existing districts and avoid pitting incumbents against each other, to the extent consistent with the goal of curing the constitutional defects in the old plan. To craft

"Democratic" and "Republican" districts, the committees used the results from a series of elections between 1988 and 1996.

In designing the plan, the committees of course sought to comply with the requirements of the Voting Rights Act, as well as the constitutional requirement of population equality. Acutely conscious of their responsibilities under *Shaw v. Reno*, 509 U.S. 630 (1993) ("*Shaw I*"), and its progeny, however, they sought a plan in which racial considerations did not predominate over traditional race-neutral districting criteria. Toward this end, they decided to emphasize the following traditional race-neutral districting principles in designing the plan: (1) avoid dividing precincts; (2) avoid dividing counties when reasonably possible;[1] (3) eliminate "cross-overs," "double cross-overs," and other artificial means of maintaining contiguity; (4) group together citizens with similar needs and interests; and (5) ensure ease of communication between voters and their representatives. The committees did not select geographic compactness as a factor that should receive independent emphasis in constructing the plan.

The committees' strategy proved successful. On March 31, 1997, the North Carolina legislature enacted a new congressional redistricting plan, 1997 Session Laws, Chapter 11 ("the 1997 plan"), the redistricting law at issue in this case. The plan is a bipartisan one, endorsed by the leadership of both parties in both houses.

B. THE 1997 PLAN.

The 1997 plan creates six "Democratic" districts and six "Republican" districts. The new districts are designed to preserve the partisan cores of their 1992 predecessors, yet their lines are significantly different: they reassign more than 25% of the State's

---

[1] In North Carolina, as in most of the southeastern states, it is virtually impossible to design a congressional map that does not split any of the State's 100 counties, given the constitutional mandate of population equality and other legitimate districting concerns.

population and nearly 25% of its geographic area. The most dramatic changes are in District 12, which contains less than 70% of its original population and only 41.6% of its original geographic area.

The 1997 plan respects the traditional race-neutral districting criteria identified by the legislature: it divides only two of the State's 2,217 election precincts (and then only to accommodate peculiar local characteristics); it divides only 22 of the State's 100 counties (none among more than two districts); all of its districts are contiguous, and it does not rely on artificial devices like cross-overs and double cross-overs to achieve that contiguity.[2] Though the legislature did not emphasize geographic compactness for its own sake in designing the 1997 plan, its districts are significantly more geographically compact, judged by standard mathematical measures of geographic compactness, than their predecessors in the 1992 plan.

The 1997 plan is racially fair, but race for its own sake was not the predominant factor in its design or the design of any district within it. Indeed, 12 of the 17 African-American members of the House voted against the plan because they believed it did not adequately take into account the interests of the State's African-American residents.

District 12 is one of the six "Democratic" districts established by the 1997 plan. Seventy-five percent of the district's registered voters are Democrats, and at least 62% of them voted for the Democratic candidate in the 1988 Court of Appeals election, the 1988 Lieutenant Governor election, and the 1990 United States Senate election. District 12 is not a majority-minority district by any measure: only 46.67% of its total population, 43.36% of its voting age population,

[2] In contrast, the 1992 plan this Court invalidated in *Shaw II* divided 80 precincts; divided 44 of the State's 100 counties (seven of them among three different districts); and achieved contiguity only through artificial devices.

and 46% of its registered voter population is African-American.[3] While it does rely on the strong demonstrated support of African-American voters for Democratic candidates to cement its status as one of the six Democratic districts, partisan election data, not race, was the predominant basis for assigning those voters to the district.

District 12 respects the traditional race-neutral redistricting criteria identified by the legislature. It divides only one precinct (a precinct that is divided in all local districting plans as well); it includes parts of only six counties; and it achieves contiguity without relying on artificial devices like cross-overs and double cross-overs.[4] It creates a community of voters defined by shared interests other than race, joining together citizens with similar needs and interests in the urban and industrialized areas around the interstate highways that connect Charlotte and the Piedmont Urban Triad. Of the 12 districts in the 1997 plan, it has the third shortest travel time (1.67 hours) and the third shortest distance (95 miles) between its farthest points, making it highly accessible for a congressional representative. District 12 is significantly more geographically compact than its 1992 predecessor.

District 1 is another of the six "Democratic" districts established by the 1997 plan. Unlike District 12, District 1 is a majority-minority district by one measure: 50.27% of its total population is African-American. Like District 12, District 1 respects the traditional race-neutral redistricting criteria identified by the legislature. It contains no divided precincts; it divides only 10 counties; and it achieves contiguity without relying on artificial devices like cross-overs and

[3] In contrast, 56.63% of the total population, 53.34% of the voting age population, and 53.54% of the registered voter population of District 12 in the 1992 plan was African-American.

[4] In contrast, District 12 in the 1992 plan divided 48 precincts; included parts of ten counties; and achieved contiguity only through artificial devices.

double cross-overs.[5] It creates a community of voters defined by shared interests other than race, joining together citizens with similar needs and interests in the mostly rural and economically depressed counties in the State's northern and central Coastal Plain.

Because 40 of North Carolina's 100 counties are subject to the preclearance requirements of § 5 of the Voting Rights Act, the legislature submitted the 1997 plan to the United States Department of Justice for preclearance. The Department precleared the plan on June 9, 1997.

C. Legal Challenges To The 1997 Plan.

1. The Remedial Proceedings in *Shaw*.

Equal protection challenges to the 1997 plan were first raised in the remedial phase of the *Shaw* litigation, when the State submitted the plan to the three-judge court to determine whether it cured the constitutional defects in the earlier plan. Two of the plaintiffs who challenge the 1997 plan in the instant case -- Martin Cromartie and Thomas Chandler Muse -- participated as parties plaintiff in that remedial proceeding, represented by the same attorney who represents them in this case, Robinson Everett.[6]

In that proceeding, Cromartie, Muse, and their co-plaintiffs ("the *Shaw* plaintiffs") were given an opportunity to litigate any constitutional challenges they might have to the 1997 plan, a plan which the State had enacted under the *Shaw* court's injunction, as a

---

[5] In contrast, District 1 in the 1992 plan split 25 precincts and 20 counties, and achieved contiguity only through artificial devices.

[6] The original plaintiffs in *Shaw* were five residents of District 12 as it existed under the 1992 plan. On remand from this Court's decision in *Shaw II*, Cromartie and Muse sought and obtained the district court's leave to join them as plaintiffs, in order to assert a claim that District 1 in the 1992 plan was an unconstitutional racial gerrymander -- a claim which this Court had just held that the original *Shaw* plaintiffs lacked standing to assert.

proposed remedy for the plan this Court had just declared unconstitutional.[7] They elected not to avail themselves of that opportunity. They did inform the *Shaw* court that they believed the 1997 plan to be "unconstitutional" because Districts 1 and 12 -- the same districts they now challenge in this action -- had been "racially gerrymandered." App. 183a-186a. At the same time, however, they asked the court not to decide their constitutional challenges to the proposed remedial plan. The reason they gave was somewhat curious: that the court lacked authority to entertain these claims, because none of them had standing to challenge the proposed plan under *United States v. Hays*, 515 U.S. 737 (1995).[8] For this reason, they asked the court "not [to] approve or otherwise rule on the validity of" the new plan, and to "dismiss this action without prejudice to the right of any person having standing to maintain a separate action attacking [its] constitutionality." App. 186a. The state defendants actively opposed plaintiffs' effort to reserve their constitutional challenges to the 1997 plan for a new lawsuit.

The three-judge court rejected the *Shaw* plaintiffs' argument that it lacked jurisdiction to entertain their constitutional challenges to the State's proposed remedial plan. App. 166a-168a. The court then went

---

[7] App. 181a-182a (directing the *Shaw* plaintiffs to advise the court "whether they intend[ed] to claim that the [1997] plan should not be approved by the court because it does not cure the constitutional defects in the former plan" and, if so, "to identify the basis for that claim").

[8] App. 186a ("Because of the lack of standing of the Plaintiffs, there appears to be no matter at issue before this Court with respect to the new redistricting plan"). The *Shaw* plaintiffs based this argument on the assertion that none of them resided in the redrawn District 12. App. 185a-186a. The argument was somewhat disingenuous, for at least two of their number -- Cromartie and Muse -- resided in the redrawn District 1 and thus had standing to assert a racial gerrymandering challenge to the 1997 plan, even under their own bizarre reading of the *Hays* decision.

on to rule that the plan was "in conformity with constitutional requirements" and that it was an adequate remedy for the constitutional defects in the prior plan "as to the plaintiffs and plaintiff-intervenors in this case." App. 160a, 167a. On that basis, the court entered an order approving the plan and authorizing the state defendants to proceed with congressional elections under it. App. 157a-158a. The *Shaw* plaintiffs took no appeal from that order.

2. The Parallel *Cromartie* Litigation.

Having forgone an opportunity to litigate their constitutional challenges to Districts 1 and 12 in the 1997 plan before the three-judge court in *Shaw*, Cromartie and Muse immediately sought to have those same claims adjudicated by a different three-judge court. They did so by amending a complaint in a separate lawsuit they had previously filed against the same defendants, a lawsuit in which they were also being represented by Robinson Everett. In that amended complaint, Cromartie, Muse, and four persons who had not been named as plaintiffs in *Shaw* ("the *Cromartie* plaintiffs") asserted racial gerrymandering challenges to Districts 1 and 12 in the 1997 plan, the very plan the three-judge court in *Shaw* had just approved over their objection.

On January 15, 1998, the *Cromartie* case was assigned to a three-judge panel, consisting of one judge who had served on the three-judge panel in *Shaw* -- Judge Voorhees, who had dissented from the panel's decisions in *Shaw I* and *Shaw II* -- and two new judges. On January 30, 1998, the *Cromartie* plaintiffs moved for a preliminary injunction halting all further elections under the 1997 plan. Several days later, they also moved for summary judgment. The state defendants responded with a cross-motion for summary judgment.

On March 31, 1998, before it had permitted either party to conduct any discovery, the three-judge court heard brief oral arguments on the pending motions for preliminary injunction and summary judgment. Three days later, the court, with Circuit Judge

Sam J. Ervin, III, dissenting, entered an order granting the *Cromartie* plaintiffs' motion for summary judgment, declaring District 12 in the 1997 plan unconstitutional, and permanently enjoining the state defendants from conducting any elections under the 1997 plan.[9] The court's order did not explain the basis for its decision, stating only that "[m]emoranda with reference to [the] order will be issued as soon as possible." App. 45a-46a.

The state defendants immediately noticed an appeal to this Court. Since the elections process under the 1997 plan was already in full swing, they asked the district court to stay its April 3rd order pending disposition of that appeal. The district court declined to do so. The state defendants then applied to Chief Justice Rehnquist for a stay of the same order. The Chief Justice referred that application to the full Court, which denied it on April 13, 1998, with Justices Stevens, Ginsburg, and Breyer dissenting. When this Court acted on that stay application, the district court had yet to issue an opinion explaining the order and permanent injunction in question.

D. The Three-Judge District Court's Opinion.

On April 14, 1998, the three-judge court issued an opinion explaining the basis for its order of April 3, 1998. At the outset, the court ruled that "the September 12, 1997, decision of the *Shaw* three-judge panel was not preclusive of the instant cause of action, as the panel was not presented with a continuing challenge to the redistricting plan." App. 3a-4a. The court then held that the *Cromartie* plaintiffs were entitled to summary judgment on their challenge to District 12, because the "uncontroverted material facts"

---

[9] The order made no reference to District 1, though the *Cromartie* plaintiffs also had moved for summary judgment on their claim that it was an unconstitutional racial gerrymander. Not until the memorandum opinion was filed on April 14, 1998, did the court explain that it was denying summary judgment as to District 1. App. 22a-23a, 53a.

established that the legislature had "utilized race as the predominant factor in drawing the District." App. 21a-22a. Unlike the lower courts whose "predominance" findings this Court upheld in *Miller*, *Bush*, and *Shaw II*, the court did not base this finding on any *direct* evidence of legislative motivation; instead, it relied wholly on an inference it drew from the district's shape and racial demographics. The court reasoned that District 12 was "unusually shaped," that it was "still the most geographically scattered" of the State's congressional districts, that its dispersion and perimeter compactness measures were lower than the mean for the 12 districts in the plan, that it "include[s] nearly all of the precincts with African-American population proportions of over forty percent which lie between Charlotte and Greensboro," and that when it splits cities and counties, it does so "along racial lines." The court concluded that these "facts," which it characterized as "uncontroverted," established -- as a matter of law -- that the legislature had "disregarded traditional districting criteria" and "utilized race as the predominant factor" in designing District 12. App. 19a-22a.

Finally, the court held that the *Cromartie* plaintiffs were *not* entitled to summary judgment on their challenge to District 1, the only majority-minority district in the 1997 plan. The court did not explain the basis for this holding, except to say that the *Cromartie* plaintiffs had "failed to establish that there are no contested material issues of fact that would entitle [them] to judgment as a matter of law as to District 1." App. 22a. In denying the state defendants' cross-motion for summary judgment on the same claim, however, the court stated that the "contested material issue of fact" concerned "the use of race as the predominant factor in the districting of District 1." App. 23a.

Judge Ervin dissented. App. 25a. In his view, the majority's conclusion that the evidence in the summary judgment record was sufficient to establish -- as a matter of law -- that race had been the predominant factor in the design of District 12, was strikingly

inconsistent with its conclusion that the same evidence was *not* sufficient to establish that race had been the predominant factor in the design of District 1, given that the two districts were drawn by the same legislators, at the same time, as part of the same state-wide redistricting process. The inconsistency was even *more* striking, he noted, "when one considers that the legislature placed more African-Americans in District 1 . . . than in District 12." App. 38a.

E. The 1998 Interim Plan.

On April 21, 1998, the court entered an order allowing the General Assembly 30 days to redraw the State's congressional redistricting plan to correct the defects it had found in the 1997 plan. App. 55a. On May 21, 1998, the General Assembly by bipartisan vote enacted another congressional redistricting plan, 1998 Session Laws, Chapter 2 ("the 1998 plan"), and submitted it to the court for approval. The 1998 plan is effective for the 1998 and 2000 elections unless this Court reverses the district court decision holding the 1997 plan unconstitutional.[10] The Department of Justice precleared the 1998 plan on June 8, 1998.

On June 22, 1998, the district court entered an order tentatively approving the 1998 plan and authorizing the State to proceed with the 1998 elections under it. App. 175a-180a. The court explained that the plan's revisions to District 12 "successfully addressed" the concerns the court had identified in its April 14, 1998 opinion, and that it appeared, "from the record now before [the court]," that race had not been the predominant factor in the design of that revised district. The court noted that it was not ruling on the constitutionality of revised District 1, and it directed the parties to prepare for trial on

---

[10] *See* 1998 N.C. Sess. Laws, ch. 2, § 1.1 ("The plan adopted by this act is effective for the elections for the years 1998 and 2000 unless the United States Supreme Court reverses the decision holding unconstitutional G.S. 163-201(a) as it existed prior to the enactment of this act.").

that issue. It also "reserve[d] jurisdiction" to reconsider its ruling on the constitutionality of redrawn District 12 "should new evidence emerge." App. 177a-179a.

ARGUMENT

I. SUMMARY JUDGMENT ISSUE.

The district court's application of the Rule 56 summary judgment standard in this context presents substantial questions that warrant either plenary consideration or summary reversal.

The threshold inquiry for deciding whether a district is subject to strict scrutiny under *Shaw*, turning as it does on the actual motivations of the state legislators who designed and enacted the plan, is peculiarly inappropriate for resolution on summary judgment. This Court has repeatedly affirmed its "reluctance to attribute unconstitutional motives to the states." *Mueller v. Allen*, 463 U.S. 388, 394 (1983). When a federal court is called upon to judge the constitutionality of an act of a state legislature, it must "presume" that the legislature "act[ed] in a constitutional manner," *Illinois v. Krull*, 480 U.S. 340, 351 (1987); *see McDonald v. Board of Election Comm'rs of Chicago*, 394 U.S. 802, 809 (1969), and remember that it "is not exercising a primary judgment but is sitting in judgment upon those who also have taken the oath to observe the Constitution." *Rostker v. Goldberg*, 453 U.S. 57, 64 (1981) (internal quotation omitted). In *Miller v. Johnson*, 515 U.S. 900 (1995), this Court made clear that these cautionary principles are fully applicable in *Shaw* cases. *See* 515 U.S. at 915 ("Although race-based decisionmaking is inherently suspect, until a claimant makes a showing sufficient to support that allegation, the good faith of a state legislature must be presumed.") (citations omitted). Indeed, they have even greater force in *Shaw* cases, given the sensitive and highly political nature of the redistricting process and the "serious intrusion" on state sovereignty that federal court review of state districting legislation represents. 515

U.S. at 916 (admonishing lower courts to exercise "*extraordinary caution*" in adjudicating *Shaw* claims) (emphasis added).

Ignoring this Court's directives, and oblivious to the fact that the invalidation of a sovereign state's duly-enacted electoral districting plan is not a casual matter, the court below resolved the contested issue of racial motivation -- and with it, the issue of the plan's validity -- on summary judgment. On the basis of a brief hearing, at which it heard no live evidence but merely argument from counsel, it concluded that plaintiffs had established -- as a matter of law -- that race had been the predominant factor in the construction of District 12. App. 21a-22a. In so doing, it committed clear and manifest error.

The district court's decision is flatly inconsistent with this Court's decision in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). There, this Court made clear that a motion for summary judgment must be resolved by reference to the evidentiary burdens that would apply at trial. *Id.* at 250-54. Where, as here, the party who seeks summary judgment will have the burden of persuasion at trial, he can obtain summary judgment only by showing that the evidence in the summary judgment record is such that no reasonable factfinder hearing that evidence at trial could possibly fail to find for him. *Id.* at 252-55. In other words, he must demonstrate that the evidence, viewed in the light most favorable to his opponent, is "so one-sided" that he would be entitled to judgment as a matter of law at trial. *Id.* at 249-52.

In this case, plaintiffs had the burden of persuasion at trial on the predominance issue. *Miller*, 515 U.S. at 916. The district court utterly ignored this critical fact in concluding that they were entitled to summary judgment on their claim challenging the constitutionality of District 12. Indeed, the court appeared to be analyzing their motion for summary judgment under the standard that applies to parties who will *not* have the burden of persuasion at trial. App. 21a (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986)).

Had the district court applied the standard this Court's precedents direct it to apply, it could not have justified the conclusion that plaintiffs were entitled to summary judgment on their claim challenging the constitutionality of District 12. To obtain summary judgment on that claim under *Liberty Lobby*, plaintiffs were required to show that no reasonable finder of fact, viewing the evidence in the summary judgment record in the light most favorable to the state defendants, could possibly find that race had *not* been the predominant factor in its design. 477 U.S. at 252-55. The only evidence in the record tending to show that race had been the predominant motivation in the construction of District 12 was an inference the plaintiffs asked the court to draw from their evidence of the district's shape and racial demographics.[11] There was absolutely no *direct* evidence[12] of such an improper motivation before the district court: no concessions to that effect from the state defendants, and no evidence of statements to that effect in the legislation itself, the committee hearings, the committee reports, the floor debates, the State's § 5 submissions, or the post-enactment statements of those who participated in the drafting or enactment of the plan. *Compare*

[11] Plaintiffs presented various maps and demographic data as well as the affidavits of several experts who relied on the same evidence of shape and racial demographics to opine that race was the predominant factor used by the State to draw the boundaries of the congressional districts. Such postenactment testimony of outside experts "is of little use" in determining the legislature's purpose in enacting a particular statute, when none of those experts "participated in or contributed to the enactment of the law or its implementation." *Edwards v. Aguillard*, 482 U.S. 578, 595-96 (1987).

[12] While the distinction between "direct" and "circumstantial" evidence is "often subtle and difficult," *Price Waterhouse v. Hopkins*, 490 U.S. 228, 291 (1989) (Kennedy, J., dissenting), most courts define "direct evidence" of motivation as "conduct or statements by persons involved in the decisionmaking process that may be viewed as directly reflecting the alleged [motivation]." *Starceski v. Westinghouse Elec. Corp.*, 54 F.3d 1089, 1096 (3d Cir. 1995)

Miller, 515 U.S. at 918; *Bush v. Vera*, 517 U.S. 952, 959-62, 969-71 (1996) (plur. op.); *Shaw II*, 517 U.S. at 906. This evidence was legally insufficient, even if uncontradicted, to permit a reasonable finder of fact to conclude that plaintiffs had discharged their burden of persuasion on the predominance issue. A court must "look further than a map" to conclude that race was a state legislature's predominant consideration in drawing district lines as a matter of law. *Johnson v. Mortham*, 915 F. Supp. 1529, 1565 (1995) (Hatchett, J., dissenting).[13]

By contrast, the summary judgment record contained substantial *direct* evidence that race had *not* been the predominant factor in the design of District 12. This evidence consisted of affidavits from the legislators who headed the legislative committees that drew the 1997 plan and shepherded it through the General Assembly. *See* App. 69a-84a. These legislators testified under oath that they and their colleagues were well aware, when they designed and passed the 1997 plan, of the constitutional limitations imposed by this Court's decisions in *Shaw I* and its progeny, and that they took pains to ensure that the plan did not run afoul of those limitations. They also testified under oath that the boundaries of District 12 in the plan had been motivated predominantly by partisan political concerns and other legitimate race-neutral districting considerations, rather than by racial considerations. At the summary judgment stage, the district court was obligated to accept this testimony as truthful. *See Liberty Lobby*, 477 U.S. at 255 ("The evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor."). The district court did precisely the opposite: it assumed that these state legislators had lied under oath about the factors that motivated them in drawing

[13] While the combination of a map and racial demographics may, under certain extraordinary circumstances, be sufficient to state a claim that race was the predominant factor in a district's design, *see Shaw I*, there is a vast difference between stating a claim and proving it.

the lines of District 12. That assumption was one this Court's precedents simply did not permit it to make at this stage of the litigation. *See id.*; *Miller*, 515 U.S. at 915-16.

The district court's application of the Rule 56 standard was so irregular that summary reversal is warranted, even if this Court concludes that the case does not present issues warranting plenary consideration. "Striking down a law approved by the democratically elected representatives of the people is no minor matter," and this Court's precedents do not permit it do be done "on the gallop." *Edwards v. Aguillard*, 482 U.S. 578, 626, 611 (1987) (Scalia, J., dissenting).

II. PRECLUSION ISSUE.

This case also raises important issues concerning the effect of a final judgment from a court of competent jurisdiction holding a state's proposed redistricting plan constitutional on the ability of the parties to that judgment and their privies to challenge the same plan again in a later lawsuit before a different court.

Two of the plaintiffs herein -- Cromartie and Muse -- participated as parties plaintiff in the remedial proceedings in *Shaw*. In those proceedings, the court offered them a full and fair opportunity to litigate any constitutional challenges they might have to the 1997 plan, which the State had proposed as a remedy for the constitutional defects found in the earlier plan. They elected not to avail themselves of that opportunity, and the *Shaw* court entered a final judgment finding the plan constitutional and authorizing the State to proceed with elections under it. Under elementary principles of claim preclusion, that final judgment extinguished any and all claims Cromartie and Muse had with respect to the validity of the 1997 plan, including the claim they now assert in this action, which challenges the plan's District 1 as a racial gerrymander. That Cromartie and Muse elected not to assert that particular claim in *Shaw* will not save it from preclusion here; indeed, the very purpose of the doctrine of

claim preclusion is to prevent plaintiffs from engaging in this sort of strategic claim-splitting.

The final judgment entered in *Shaw* also bars the claim plaintiffs Everett, Froelich, Linville, and Hardaway assert in this action, which challenges the 1997 plan's District 12 as a racial gerrymander. Though these individuals were not formally named as parties in *Shaw*, they are bound by the final judgment entered in that case because their interests were so closely aligned with those of the *Shaw* plaintiffs as to make the *Shaw* plaintiffs their "virtual representatives" in that earlier action.[14]

Ignoring fundamental principles of claim preclusion, the district court held that the final judgment entered in *Shaw* did not bar the claims appellants assert here. App. 3a-4a. The court based this conclusion on its understanding that the *Shaw* court "was not presented with a continuing challenge to the redistricting plan." App. 4a. To the extent the court meant that the *Shaw* court did not resolve

---

[14] A party may be bound by a prior judgment, even though he was not formally named as a party in that prior action, when his interests were closely aligned with those of a party to the prior action and there are other indicia that the party was serving as the non-party's "virtual representative" in the prior action. *See Ahng v. Allsteel, Inc.*, 96 F.3d 1033, 1037 (7th Cir. 1996); *Chase Manhattan Bank, N.A. v. Celotex Corp.*, 56 F.3d 343, 345-46 (2d Cir. 1995); *Gonzalez v. Banco Cent. Corp.*, 27 F.3d 751, 761 (1st Cir. 1994); *Nordhorn v. Ladish Co.*, 9 F.3d 1402, 1405 (9th Cir. 1993); *Royal Ins. Co. of Am. v. Quinn-L Capital Corp.*, 960 F.2d 1286, 1297 (5th Cir. 1992); *Jaffree v. Wallace*, 837 F.2d 1461, 1467-68 (11th Cir. 1988). The relationship between the *Shaw* plaintiffs and the four plaintiffs who challenge District 12 in this action has many of the classic indicia of "virtual representation": close relationships between the parties and the nonparties, shared counsel, simultaneous litigation seeking the same basic relief under the same basic legal theory, and apparent tactical maneuvering to avoid preclusion. *See Jaffree*, 837 F.2d at 1467.

the issue of the 1997 plan's constitutionality, it was mistaken.[15] To the extent the court meant only that the *Shaw* plaintiffs chose to assert no challenge to the 1997 plan in those earlier proceedings, it missed the central point of the doctrine of claim preclusion, which bars claims that were *or could have been* brought in the prior proceedings. The district court's holding on the preclusion issue presents substantial questions warranting either plenary consideration or summary reversal.

The district court's decision conflicts directly with this Court's cases defining the preclusive effect of a prior federal judgment. As those decisions make plain, when a federal court enters a final judgment, that judgment stands as an "absolute bar" to a subsequent action concerning the same "claim or demand" between the same parties and those in privity with them, "not only as to every matter which was offered and received to sustain or defeat the claim or demand, but [also] as to any other admissible matter which might have been offered for that purpose." *Cromwell v. County of Sac*, 94 U.S. 351, 352 (1876).

The district court's decision also conflicts with *Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394 (1981). In that case, this Court

---

[15] The *Shaw* court did not expressly reserve the claims in question for resolution in a later proceeding. Though the *Shaw* plaintiffs asked it to "dismiss the action without prejudice to the right of any person having standing to bring a new action attacking the constitutionality of the [1997] plan," App. 186a, the court declined to do so. While the court stated that its approval of the plan was necessarily "limited by the dimensions of this civil action as that is defined by the parties and the claims properly before us," and that it therefore did not "run beyond the plan's remedial adequacy with respect to those parties," it specifically held the plan constitutional "as to the plaintiffs . . . in this case." App. 167a, 160a. The only claim the court dismissed "without prejudice" was "the claim added by amendment to the complaint in this action on July 12, 1996," in which the *Shaw* plaintiffs "challenged on 'racial gerrymandering' grounds the creation of *former* congressional District 1." App. 158a. (emphasis added.) As the court recognized, this claim was mooted by its approval of the 1997 plan. App. 165a, 168a.

made clear that a federal court may not refuse to apply the doctrine of claim preclusion simply because it believes the prior judgment to be wrong. *Id.* at 398. As this Court explained, the doctrine of claim preclusion serves "vital public interests beyond any individual judge's ad hoc determination of the equities in a particular case," including the interest in bringing disputes to an end, in conserving scarce judicial resources, in protecting defendants from the expense and vexation of multiple duplicative lawsuits, and in encouraging reliance on the court system by minimizing the possibility of inconsistent judgments. *Id.* at 401. The district court's decision here -- a transparent attempt to correct a perceived error in an earlier judgment that the losing party failed to appeal -- flies in the face of this bedrock principle of our civil justice system.[16]

The policies behind the doctrine of claim preclusion are at their most compelling when the claims in question seek to interfere with a state's electoral processes. The strong public interest in the orderly administration of the nation's electoral machinery requires efficient and decisive resolution of any disputes regarding these matters.[17] In this case, the district court's disregard of basic principles of claim preclusion has resulted in the entry of two dramatically inconsistent

---

[16] In addition, the district court's decision conflicts, at least in principle, with the decisions of at least six federal circuit courts applying the "virtual representation" theory of privity. *See* cases cited *supra* note 14. This conflict is illustrative of the widespread confusion in the lower federal courts as to the proper scope of the "virtual representation" doctrine. *See* 18 JAMES WM. MOORE, ET AL., MOORE'S FEDERAL PRACTICE § 131.40[3][e][I][B] (3d ed. 1997) (collecting cases); 18 C. WRIGHT, ET AL., FEDERAL PRACTICE AND PROCEDURE § 4457 (1981) (same).

[17] Precisely for this reason, Congress has provided for a right of direct appeal to this Court from any order of a three-judge court granting or denying a request for injunctive relief in any civil action challenging the constitutionality of the apportionment of congressional districts or the apportionment of any statewide legislative body. *See* 28 U.S.C. § 1253; 28 U.S.C. § 2284(a).

judgments -- one ordering the State to go forward with its congressional elections under the 1997 plan and the other enjoining it from doing so -- which have left the State's electoral process in disarray. It has significantly prolonged final resolution of the legal controversy over the constitutionality of North Carolina's congressional districts, wasting judicial resources, diverting the state legislature from the business of governing, and causing the State's taxpayers to incur significant additional expense. It is difficult to imagine a greater affront to the policies behind the doctrine of claim preclusion, to core principles of state sovereignty and federalism, and to the very integrity of the federal system of justice itself.

The district court's resolution of the preclusion issue is so flatly inconsistent with this Court's precedents that summary reversal is warranted, even if this Court concludes that the case does not present issues warranting plenary consideration.

III. PREDOMINANCE ISSUE.

In *Shaw I*, this Court first recognized that a facially race-neutral electoral districting plan could, in certain exceptional circumstances, be a "racial classification" that was subject to strict scrutiny under the equal protection clause. 509 U.S. at 642-44, 646-47, 649. Two years later, in *Miller*, this Court set forth the showing required to trigger strict scrutiny of such a districting plan: "that *race for its own sake*, and not other districting principles, was the legislature's *dominant and controlling rationale* in drawing its district lines." 515 U.S. at 913 (emphasis added). To satisfy this standard, a plaintiff must prove that the legislature "subordinated traditional race-neutral districting principles . . . to racial considerations," so that race was "the predominant factor" in the design of the districts. *Id.* at 916; *see id.* at 928-29 (O'Connor, J., concurring) (strict scrutiny applies only when "the State has relied on race in substantial disregard of customary and traditional [race-neutral] districting practices").

In *Miller*, this Court recognized that "[f]ederal court review of districting legislation represents a serious intrusion on the most vital of local functions," that redistricting legislatures are almost always aware of racial demographics, and that the "distinction between being aware of racial considerations and being motivated by them" is often difficult to draw. 515 U.S. at 915-16. For these reasons, this Court directed the lower courts to "exercise extraordinary caution" in applying the "predominance" test. *Id.* at 916; see *id.* at 928-29 (O'Connor, J., concurring) (stressing that the *Miller* standard is a "demanding" one, which subjects only "extreme instances of [racial] gerrymandering" to strict scrutiny)

In its various opinions in *Bush*, this Court made clear that proof that the legislature considered race as a factor in drawing district lines is not sufficient, without more, to trigger strict scrutiny. *See* 517 U.S. at 958 (plur. op.); *id.* at 993 (O'Connor, J., concurring); and *id.* at 999-1003 (Thomas, J., joined by Scalia, J., concurring in judgment). Nor is proof that the legislature neglected traditional districting criteria sufficient to trigger strict scrutiny. *See id.* at 962 (plur. op.); *id.* at 993 (O'Connor, J., concurring); *id.* at 1000-001 (Thomas, J., joined by Scalia, J., concurring in judgment). Instead, strict scrutiny applies only when the plaintiff establishes *both* that the State *substantially* neglected traditional districting criteria in drawing district lines, *and* that it did so *predominantly* because of racial considerations. *See id.* at 962-63 (plur. op.) and at 993-94 (O'Connor, J., concurring) (emphasis added). *Accord Shaw II*, 517 U.S. at 906-07; *Lawyer v. Justice*, 117 S. Ct. 2186, 2194-95 (1997).

In this case, the North Carolina legislature, exercising the State's sovereign right to design its own congressional districts, selected a number of traditional -- and race-neutral -- districting criteria to be used in constructing the 1997 plan: contiguity, respect for political subdivisions, respect for actual communities of interest, preserving the partisan balance in the State's congressional delegation, preserving the cores of prior districts, and avoiding contests between

incumbents. All of these criteria were ones that this Court had previously approved as legitimate districting criteria.[18] The legislature did not, however, select geographic compactness as a criterion to receive independent emphasis in drawing the plan. The 1997 plan as drawn does not neglect any of the traditional race-neutral districting criteria the legislature set out to follow; to the contrary, it substantially complies with all of them.

The district court nonetheless concluded that the legislature "disregarded traditional districting criteria" in designing District 12, because it failed to comply with two race-neutral districting principles that it never purported to be following -- specifically, the criteria of "geographical integrity" and "compactness." App. 21a-22a. The court believed the legislature's apparent disregard of these two districting principles in drawing District 12, together with evidence that the district "include[s] nearly all of the precincts with African-American population proportions of over forty percent which lie between Charlotte and Greensboro," and that it "bypasse[s]" certain precincts with large numbers of registered Democrats, established that race, rather than partisan political preference, had been the predominant factor in the design of District 12. App. 19a-21a. This extreme misapplication of the threshold test for application of strict scrutiny in a case of such importance to the people of North Carolina warrants plenary review for at least four reasons.

First, the district court's reliance on District 12's relative lack of geographic compactness and geographical integrity was based on a fundamental misunderstanding of the nature and purpose of the

---

[18] *See Miller*, 515 U.S. at 916 (contiguity, respect for political subdivisions, and respect for communities defined by shared interests other than race); *Gaffney v. Cummings*, 412 U.S. 735, 751-54 (1973) (preserving partisan balance); *Karcher v. Daggett*, 462 U.S. 725, 740 (1983) (preserving the cores of prior districts and avoiding contests between incumbents); *Reynolds v. Sims*, 377 U.S. 533, 580 (1964) (ensuring "access of citizens to their representatives").

"disregard for traditional districting criteria" aspect of the *Miller* test.[19] As this Court has explained repeatedly, a state's deviation from traditional race-neutral districting criteria is important in this context *only* because it may, when coupled with evidence of racial demographics, serve as "circumstantial evidence" that "race for its own sake, and not other districting principles, was the legislature's dominant and controlling rationale in drawing district lines." *Miller*, 515 U.S. at 913; *see id.* at 914 ("disclose[s] a racial design"); *Bush*, 517 U.S. at 964 (plur. op.) ("correlations between racial demographics and [irregular] district lines," if not explained "in terms of non-racial motivations," tend to show "that race predominated in the drawing of district lines"). The notion is that when a state casts aside the race-neutral criteria it would normally apply in districting to draw a majority-minority district, it is very likely to have done so for predominantly racial reasons. For this inquiry to serve its purpose, it must focus not on the degree to which the challenged district deviates from some set of race-neutral districting principles that a hypothetical state -- or a federal court -- might find appropriate in designing a plan, but rather on the *precise* set of race-neutral districting principles that the *particular* state would otherwise apply in designing its districts,

---

[19] Indeed, this misunderstanding of the "traditional race-neutral districting criteria" to which *Miller* refers drove the district court to the otherwise inexplicable conclusion that plaintiffs had established -- as a matter of law -- that race was the predominant factor in the design of District 12, but that they had not established -- as a matter of law -- that it was the predominant factor in the design of District 1. App. 17a-22a. The evidence that racial considerations had played a significant role in the line-drawing process was much stronger with respect to District 1 than to District 12, for it was undisputed that District 1 is a majority-minority district enacted to avoid a violation of § 2 of the Voting Rights Act. The only conceivable explanation for the district court's conclusion that District 12 was a racial gerrymander as a matter of law, but District 1 was not, was its perception that District 1 was not as "irregular" as District 12 and had better "comparative compactness indicators." App. 13a-14a.

were it not pursuing a covert racial objective. *See Quilter v. Voinovich*, 981 F. Supp. 1032, 1045 n.10 (N.D. Ohio 1997), *aff'd* 118 S. Ct. 1358 (1998) (characterizing the inquiry as "designed to identify situations in which states have neglected the criteria they would otherwise consider in pursuit of race-based objectives").

In this case, the district court evaluated District 12's compliance with traditional race-neutral districting criteria by reference to two such criteria that the people of North Carolina have *not* required their legislature to observe in districting: "geographic compactness" and "geographical integrity." In so doing, the district court apparently relied on this Court's frequent references to compactness as a traditional race-neutral districting criteria. *See, e.g., Shaw I*, 509 U.S. at 647; *Miller*, 515 U.S. at 916; *Bush*, 517 U.S. at 959-66 (plur. op.). But this Court has never indicated that the race-neutral districting criteria it has mentioned in its opinions are anything but illustrations. *See, e.g., Miller*, 515 U.S. at 916 (describing "traditional race-neutral districting principles" as "including *but not limited to* compactness, contiguity, and respect for political subdivisions or communities defined by actual shared interests") (emphasis added). Nor has this Court ever indicated that a state's deviation from abstract numerical measures of compactness has any probative value whatsoever when the state in question does *not* have a stated goal of drawing compact districts.[20]

---

[20] Indeed, this Court's recent decision in *Lawyer* suggests precisely the opposite. In *Lawyer*, the plaintiffs presented evidence that the challenged state legislative district encompassed more than one county, crossed a body of water, was irregular in shape, and lacked geographic compactness. 117 S. Ct. at 2195. The district court found this evidence insufficient to establish that traditional districting principles had been subordinated to race in the district's design, because these were all "common characteristics of *Florida* legislative districts, being products of the State's geography and the fact that 40 Senate districts are superimposed on 67 counties." *Id.* (emphasis added). This Court upheld that finding, on the ground that the "unrefuted evidence show[s] that on each of these points District 21 is no different from what *Florida's* traditional districting principles could be expected to produce." *Id.* (emphasis added).

The district court's decision effectively requires all states with racially-mixed populations to comply with "objective" standards of geographic compactness in drawing their congressional and legislative districts. Such a requirement is flatly inconsistent with this Court's repeated statements that geographic compactness is not a constitutionally-mandated districting principle. *See Bush*, 517 U.S. at 962 (plur. op.); *Shaw I*, 509 U.S. at 647. It also conflicts directly with this Court's long-standing recognition that the Constitution accords the states wide-ranging discretion to design their congressional and legislative districts as they see fit, so long as they remain within constitutional bounds. *See Quilter*, 507 U.S. 156; *Wise v. Lipscomb*, 437 U.S. 535, 539 (1978). Surely this means that the states are entitled to decide which particular race-neutral districting criteria they will emphasize in drawing their districts, without worrying that strict scrutiny will apply if a federal judge disagrees with their choices.[21]

Second, the district court's decision conflicts directly with this Court's decision in *Bush*. There, a majority of this Court made clear that a district is not subject to strict scrutiny simply because there is some correlation between its lines and racial demographics if the evidence establishes that those lines were in fact drawn on the basis of political voting preference, rather than race. 517 U.S. at 968 (plur. op.) ("If district lines merely correlate with race because they are drawn on the basis of political affiliation, which correlates with race, there is no racial classification to justify"); *see id.* at 1027-32 (Stevens, J., joined by Ginsburg and Breyer, JJ., dissenting); *id.* at

---

[21] This is not to suggest, of course, that a state could avoid the strict scrutiny of *Shaw* and *Miller* simply by choosing to establish "minimal or vague criteria (or perhaps none at all)," so that "it could never be found to have neglected or subordinated those criteria to race." *Quilter*, 981 F. Supp. at 1081 n.10. But that is not what happened here.

1060-61 (Souter, J., joined by Ginsburg and Breyer, JJ., dissenting). Contrary to the district court's suggestion, this is not a situation like that in *Bush*, where the state has used race as a proxy for political characteristics in its political gerrymandering. Instead, the undisputed evidence in the summary judgment record showed that the State used political characteristics themselves, not racial data, to draw the lines. The legislature's use of such political data to accomplish otherwise legitimate political gerrymandering will not subject the resulting district to strict scrutiny, "regardless of its awareness of its racial implications and regardless of the fact that it does so in the context of a majority-minority district." *Id.* at 968 (plur. op.); *see id.* at 1027-32 (Stevens, J., joined by Ginsburg and Breyer, JJ., dissenting); *id.* at 1060-61 (Souter, J., joined by Ginsburg and Breyer, JJ., dissenting).

Third, the district court's decision raises substantial, unresolved questions concerning the circumstances under which a plaintiff can satisfy the threshold test for strict scrutiny based solely on an inference drawn from a district's shape and racial demographics. *Miller* held that a plaintiff can prove the legislature's predominantly racial motive with either "circumstantial evidence of a district's shape and demographics or more direct evidence going to legislative purpose." 515 U.S. at 916. In all of its prior cases finding the threshold test for strict scrutiny met, however, this Court has relied heavily on substantial *direct* evidence of legislative motivation. *See id.* at 918 (relying on the State's § 5 submissions, the testimony of the individual state officials who drew the plan, and the State's formal concession that it had deliberately set out to create majority-minority districts in order to comply with the Department of Justice's "black maximization" policy); *Bush*, 517 U.S. at 959-61, 969-71 (plur. op.) (same); *id.* at 1002 & n.2 (Thomas, J., concurring in the judgment) (same); *Shaw II*, 517 U.S. at 906 (same). As a result, this Court has never confronted the question of how much circumstantial evidence is enough to satisfy the *Miller* predominance standard, in the absence

of any direct evidence of racial motivation. *See Miller*, 515 U.S. at 917 (specifically reserving this issue).

The plaintiffs in this case, unlike those in *Miller*, *Bush*, and *Shaw II*, base their claim that race was the predominant factor in the design of Districts 12 solely on circumstantial evidence of shape and racial demographics. Yet their circumstantial evidence is decidedly less powerful than that presented by their counterparts in *Miller*, *Bush*, and *Shaw II*. First, and most fundamentally, the district they challenge is not a majority-minority district, as were the districts at issue in those cases. This Court's recent decision in *Lawyer*, which rejected a claim that a challenged Florida state senate district was a racial gerrymander, makes clear that this is an important distinction. 117 S. Ct. at 2191, 2195 (emphasizing that the challenged district was not majority-black and noting that "similar racial composition of different political districts" is not "necessary to avoid an inference of racial gerrymandering in any one of them."). In addition, the shape of the district challenged here, though somewhat irregular, does not reveal "substantial" disregard for traditional race-neutral districting principles.[22] Finally, the undisputed evidence here established that the racial data the legislature used in designing these districts was no more detailed than the other demographic data it used. *Compare Bush*, 517 U.S. at 962-67, 969-71, 975-76 (plur. op.) (finding

---

[22] In sharp contrast to former District 12, which this Court invalidated in *Shaw II*, current District 12 is contiguous, respects the integrity of political subdivisions to the extent reasonably possible, and creates a community of interest defined by criteria other than race. While it has relatively low dispersion and perimeter compactness measures, this is insufficient to support a finding that the legislature "substantially" disregarded traditional districting criteria in designing it, even if geographic compactness can be considered one of the State's "traditional districting criteria." *See Quilter*, 981 F. Supp. at 1048 (expressing "doubt" that a state's neglect of *one* of its many traditional districting criteria "would be sufficient to show the kind of flagrant disregard that would indicate that traditional districting principles were subordinated to racial objectives").

legislature's use of racial data that was significantly more detailed than its data on other voter demographics strong circumstantial evidence that race had been its predominant consideration in designing the challenged districts).

On this record, there is a substantial question whether plaintiffs' evidence of shape and racial demographics is sufficient to support an inference that race was the predominant factor in the design of District 12. Indeed, the evidence of shape and demographics here closely resembles that offered by the plaintiffs in *Lawyer*, which this Court found insufficient to support an inference of racial gerrymandering. *See* 117 S. Ct. at 2195. In addition, the state defendants rebutted any such inference with substantial *direct* evidence that partisan political preference, and not race, had been the predominant factor in the district's design. Under this Court's decisions, that should have been sufficient to avoid strict scrutiny, in the absence of any direct evidence of racial motivation. *See Shaw I*, 509 U.S. at 653, 658 (indicating that State can avoid strict scrutiny by "contradicting" the inference of racial motivation that arises from plaintiffs' evidence of shape and racial demographics); *Miller*, 515 U.S. at 916 (strict scrutiny does not apply where the state establishes that "race-neutral considerations are the basis for redistricting legislation, and are not subordinated to race").[23]

Finally, the district court's decision sets far too low a threshold for subjecting a state's districting efforts to strict -- and potentially fatal -- constitutional review. Under its reasoning, a private plaintiff can trigger strict scrutiny of a state redistricting plan simply by

---

[23] In an analogous "mixed motives" situation -- the individual disparate treatment case under Title VII -- four members of this Court have endorsed a rule that would require plaintiff to produce "direct evidence" that the impermissible criterion was a substantial motivating factor in the challenged decision in order to prevail. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 275-76 (1989) (O'Connor, J., concurring), 290 (Kennedy, J., joined by Rehnquist, C.J. and Scalia, J., dissenting).

showing that its districts are somewhat irregular in shape and that some of them have heavier concentrations of minority voters than others. If strict scrutiny is this easily triggered, the states, particularly those subject to the preclearance requirements in § 5 of the Voting Rights Act, will find themselves in an impossible bind. If they take race into account in districting, in order to avoid violating the Voting Rights Act, they face private lawsuits under the Equal Protection Clause; but if they do not, they face both denial of preclearance under § 5 of the Voting Right Act and private lawsuits under § 2. *See Bush*, 517 U.S. at 990-95 (O'Connor, J., concurring) (noting the tension between the Voting Rights Act, which requires the states to consider race in districting, and the Fourteenth Amendment, which requires courts "to look with suspicion on the[ir] excessive use of racial considerations"). Nearly every plan they draw will be subject to challenge on one ground or the other, nearly every plan will be the subject of protracted litigation in the federal courts, and the federal courts will become the principal architects of their congressional and legislative districting plans. This Court should not tolerate such an unprecedented intrusion by the federal judiciary into this "most vital" aspect of state sovereignty. *Miller*, 515 U.S. at 915.

The district court's extreme misapplication of the threshold test for strict scrutiny illustrates the need for this Court to provide additional guidance on its proper application in cases where there is no direct evidence of racial motivation, the district in question is not a majority-minority district, and it does not disregard the State's stated race-neutral districting criteria. This situation will arise with some frequency in the next round of *Shaw* cases, particularly in states like North Carolina, which remain subject to a realistic threat of liability under § 2 of the Voting Rights Act if they do not pay close attention to racial fairness in districting. As Justice O'Connor recognized in *Bush*, these states -- and the lower courts -- are entitled to "more definite guidance as they toil with the twin demands of the Fourteenth

Amendment and the VRA." 517 U.S. at 990 (O'Connor, J., concurring).

CONCLUSION

For the forgoing reasons, this Court should summarily reverse the April 6, 1998 judgment of the district court and remand the case for trial. In the alternative, this Court should note probable jurisdiction of this appeal.

Respectfully submitted,

MICHAEL F. EASLEY
North Carolina Attorney General

Edwin M. Speas, Jr.*
Chief Deputy Attorney General

Tiare B. Smiley
Special Deputy Attorney General

Melissa L. Saunders
Special Counsel to the Attorney General

July 6, 1998

*Counsel of Record

APPENDIX

TABLE OF CONTENTS

Opinions of United States District Court for the Eastern District of North Carolina, April 14, 1998

Memorandum Opinion 1a
Dissent 25a

Order and Permanent Injunction of United States District Court for the Eastern District of North Carolina, April 3, 1998 ..... 45a

Notice of Appeal, April 6, 1998 ..... 47a

Judgment of United States District Court for the Eastern District of North Carolina, April 6, 1998 ..... 49a

Amended Notice of Appeal, April 8, 1998 ..... 51a

Judgment of United States District Court for the Eastern District of North Carolina, April 14, 1998 ..... 53a

Order of United States District Court for the Eastern District of North Carolina, April 21, 1998 ..... 55a

North Carolina 1997 Congressional Plan (map) 59a

North Carolina 1992 Congressional Plan (map) 61a

¶97C-27N of the Section 5 Submission Commentary, Affidavit of Gary O. Bartlett (CD 47*) 63a

* Civil Docket

Affidavit of Senator Roy A. Cooper, III
(without attachments) (CD 47) 69a

Affidavit of Representative W. Edwin McMahan
(without attachment) (CD 47) 79a

Affidavit of David W. Peterson, PhD
(without attachment) (CD 47) 85a

Affidavit of Dr. Alfred W. Stuart
(without attachments) (CD 47) 101a

"An Evaluation of North Carolina's 1998
Congressional Districts" by Professor
Gerald R. Webster (without maps) (CD 47) 107a

Shaw, et al. v. Hunt, et al.,
CA No. 92-202-CIV-5-BR, Order of United States
District Court for the Eastern District of
North Carolina, September 12, 1997 ..... 157a

Shaw, et al. v. Hunt, et al.,
CA No. 92-202-CIV-5-BR, Memorandum Opinion
of the United States District Court for the
Eastern District of North Carolina,
September 12, 1997 ..... 159a

U.S. CONST. amend. XIV, § 1 ..... 169a

FED. R. CIV. P. 56 ..... 171a

Order of the United States District Court for the
Eastern District of North Carolina, June 22, 1998 ..... 175a

Shaw, et al. v. Hunt, et al.,
CA No. 92-202-CIV-5-BR, Order of
United States District Court for the Eastern District
of North Carolina, June 9, 1997 ..... 181a

Shaw, et al. v. Hunt, et al.,
CA No. 92-202-CIV-5-BR, Plaintiffs' Response to
Order of June 9, 1997, June 19, 1997 ..... 183a

[This page intentionally left blank]

OPINIONS OF UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA, APRIL 14, 1998

[Caption Omitted in Printing]

MEMORANDUM OPINION

This matter is before the Court on the Plaintiffs' Motions for Preliminary Injunction and for Summary Judgment, and on the Defendants' Motion for Summary Judgment. The underlying action challenges the congressional redistricting plan enacted by the General Assembly of the State of North Carolina on March 31, 1997, contending that it violates the Equal Protection Clause of the Fourteenth Amendment, and relying on the line of cases represented by *Shaw v. Hunt*, 517 U.S. 899, 116 S. Ct. 1894, 135 L. Ed. 2d 207 (1996) ("*Shaw II*"), and *Miller v. Johnson*, 515 U.S. 900, 904, 115 S. Ct. 2475, 2482, 132 L. Ed. 2d 762 (1995).

Following a hearing in this matter on March 31, 1998, the Court took the parties' motions under advisement and thereafter issued an Order and Permanent Injunction (1) finding that the Twelfth Congressional District under the 1997 North Carolina Congressional Redistricting Plan is unconstitutional, and granting Plaintiffs' Motion for Summary Judgment as to the Twelfth Congressional District; (2) granting Plaintiffs' Motion for Preliminary Injunction and granting Plaintiffs' request, as contained in its Complaint, for a Permanent Injunction, thereby enjoining Defendants from conducting any

primary or general election for congressional offices under the redistricting plan enacted as 1997 N.C. Session Laws, Chapter 11; and (3) ordering that the parties file a written submission addressing an appropriate time period within which the North Carolina General Assembly may be allowed the opportunity to correct the constitutional defects in the 1997 Congressional Redistricting Plan, and to present a proposed election schedule to follow redistricting which provides for a primary election process culminating in a general congressional election to be held on Tuesday, November 3, 1998, the date of the previously scheduled general election.

That Order was issued on April 3, 1998, by a majority of the three-judge panel. Circuit Judge Sam J. Ervin, III, dissented. Defendants filed a Motion for a Stay of the April 3 Order, which was denied by this Court by Order dated April 6, 1998. Defendants also appealed the April 3 Order to the Supreme Court, and the appeal is still pending in that Court. This Memorandum and Opinion refers to that Order, and shall be the opinion of the Court.

BACKGROUND

In *Shaw II* the United States Supreme Court held that the Twelfth Congressional District created by the 1992 Congressional Redistricting Plan (hereinafter, the "1992 plan") had been race-based and could not survive the required "strict scrutiny." 517 U.S. 899, 116 S. Ct. 1894. The five plaintiffs

in *Shaw* lacked standing to attack the other majority-minority district (the First Congressional District under the 1992 plan) because they were not registered voters in the district. *Id.*

Soon after the Supreme Court ruled in *Shaw II*, three residents of Tarboro, North Carolina, filed the original Complaint in this action on July 3, 1996. These original Plaintiffs resided in the First Congressional District (alternatively, "District 1") as it existed under North Carolina's 1992 plan. The Plaintiffs charged that the First Congressional District violated their rights to equal protection under the United States Constitution because race predominated in the drawing of the District. The action was stayed pending resolution of remand proceedings in *Shaw v. Hunt*, and on July 9, 1996, the same three Tarboro residents joined the Plaintiffs in *Shaw* in filing an Amended Complaint in that case, similarly challenging District l.

By Order dated September 12, 1997, the three-judge panel in *Shaw* approved a congressional redistricting plan enacted on March 31, 1997, by the General Assembly as a remedy for the constitutional violation found by the Supreme Court to exist in the Twelfth Congressional District (alternatively, "District 12"). The *Shaw* three-judge panel also dismissed without prejudice, as moot, the plaintiffs' claim that the First Congressional District in the 1992 plan was unconstitutional. Although it was a final order, the September 12, 1997, decision of the *Shaw* three-judge panel was not preclusive of

the instant cause of action, as the panel was not presented with a continuing challenge to the redistricting plan.[1]

On October 17, 1997, this Court dissolved the stay previously entered in this matter. On the same day, two of the original three Plaintiffs, along with four residents of District 12, filed an amended Complaint challenging the 1997 remedial congressional redistricting plan (the "1997 plan"), and seeking a declaration that the First and Twelfth Congressional Districts in the 1997 plan are unconstitutional racial gerrymanders. The three-judge panel was designated by order of Chief Judge Wilkinsion [sic] of the Fourth Circuit Court of Appeals, dated January 23, 1998. The Plaintiffs moved for a preliminary injunction on January 30, 1998, and for summary judgment on February 5, 1998. The Defendants filed their instant summary

---

[1] In its final Memorandum Opinion, the three-judge panel in *Shaw*, noted that there was "no substantive challenge to the [1997] plan by any party to this action," and closed by explicitly "noting the limited basis of the approval of the plan that we are empowered to give in the context of this litigation. It is limited by the dimensions of this civil action as that is defined by the parties and the claims properly before us. Here, that means that we only approve the plan as an adequate remedy for the specific violation of the individual equal protection rights of those plaintiffs who successfully challenged the legislature's creation of former District 12. Our approval thus does not-cannot-run beyond the plan's remedial adequacy with respect to those parties and the equal protection violation found as to former District 12." *Shaw v. Hunt*, No. 92-202-CIV-5-BR, at 8 (E.D.N.C. Sept. 12, 1997).

judgment motion on March 2, 1998, and a hearing on these motions was held on March 31, 1998.

FACTS

The North Carolina General Assembly convened in regular session on January 29, 1997, and formed redistricting committees to address the defects found in the 1992 plan. These newly formed House and Senate Committees aimed to identify a plan which would cure the constitutional defects and receive the support of a majority of the members of the General Assembly. Affidavit of Senator Roy A. Cooper, III ("Cooper Aff.") ¶3. In forming a workable plan, the committees were guided by two avowed goals: (1) curing the constitutional defects of the 1992 plan by assuring that race was not the predominant factor in the new plan, and (2) drawing the plan to maintain the existing partisan balance in the State's congressional delegation. Cooper Aff. ¶¶5, 8, 10, 14; Affidavit of Gary O. Bartlett, Executive Secretary-Director of the State Board of Elections ("Bartlett Aff."), Vol. I Commentary at 9-10.

To achieve the second goal, the redistricting committees draw the new plan (1) to avoid placing two incumbents in the same district and (2) to preserve the partisan core of the existing districts to the extent consistent with the goal of curing the defects in the old plan. Cooper Aff. ¶14. The plan as enacted reflects these directives: no two incumbent Congressmen reside in the same district, and each district retains at least

60% of the population of the old district. Cooper Aff. ¶8, Affidavit of Representative W. Edwin McMahan ("McMahan Aff.") ¶7.

I. The Twelfth Congressional District

District 12 is one of the six predominantly Democratic districts established by the 1997 plan to maintain the 6-6 partisan division in North Carolina's congressional delegation. District 12 is not a majority-minority district,[2] but 46.67 percent of its total population is African-American. Bartlett Aff., Vol. I Commentary at 10 and 11. District 12 is composed of six counties, all of them split in the 1997 plan. The racial composition of the parts of the six sub-divided counties assigned to District 12 include three with parts over 50 percent African-American, and three in which the African-American percentage is under 50 percent. Declaration of Ronald E. Webber ("Webber Dec.") ¶18. However, almost 75 percent of the total population in District 12 comes from the three county parts which are majority African-American in population: Mecklenburg, Forsyth, and Guilford counties. *Id.* The other three county parts (Davidson, Iredell, and Rowan) have narrow

[2] The Twelfth is not a majority-minority district as measured by any of three possible criteria. African-Americans constitute 47 percent of the total population of District 12, 43 percent of the voting age population of the District, and 46 percent of the registered voters in the District. Peterson Aff., at 8.

corridors which pick up as many African-Americans as are needed for the district to reach its ideal size.[3] *Id.*

Where Forsyth County was split, 72.9 percent of the total population of Forsyth County allocated to District 12 is African-American, while only 11.1 percent of its total population assigned to neighboring District 5 is African-American. *Id.* ¶20. Similarly, Mecklenburg County is split so 51.9 percent of its total population allocated to District 12 is African-American, while only 7.2 percent of the total population assigned to adjoining District 9 is African-American.

A similar pattern emerges when analyzing the cities and towns split between District 12 and its surrounding districts: the four largest cities assigned to District 12 are split along racial lines. *Id.* ¶23. For example, where the City of Charlotte is split between District 12 and adjacent District 9, 59.47 percent of the population assigned to District 12 is African-American, while only 8.12 percent of the Charlotte population assigned to District 9 is African-American. Affidavit of Martin B. McGee ("McGee Aff."), Ex. L. And where the City of Greensboro is split, 55.58 percent of the population assigned to District 12 is African-American, while only 10.70 percent of the population assigned to District 6 is African-American. *Id.*

[3] An equitably populated congressional district in North Carolina needs a total population of about 552,386 persons using 1990 Census data. Weber Dec. ¶39.

An analysis of the voting precincts immediately surrounding District 12 reveals that the legislature did not simply create a majority Democratic district amidst surrounding Republican precincts. For example, around the Southwest edge of District 12 (in Mecklenburg County), the legislature included within the district's borders several precincts with racial compositions of 40 to 100 percent African-American; while excluding from the district voting precincts with less than 35 percent African-American population, but heavily Democratic voting registrations. Among Mecklenburg County precincts which are immediately adjacent to District 12, but not inside it, are precincts with 58.818 percent of voters registered as Democrats, and precincts that are 56.464 percent Democratic 54.213 percent Democratic, 59.135 percent Democratic, 59.225 percent Democratic, 54.498 percent Democratic, 59.098 percent Democratic, 55.72 percent Democratic, 54.595 percent Democratic, 54.271 percent Democratic, 63.452 percent Democratic, and 59.453 percent Democratic. *Id.*, Ex. P. Similarly, Forsyth County precincts that are immediately adjacent to, but not inside, District 12 include precincts with 57.371 percent Democratic registration, 65.253 percent Democratic registration, 65.747 percent Democratic registration, 65.747 percent Democratic registration, 76 percent Democratic registration, 55.057 percent Democratic registration, 55.907 percent Democratic registration, 56.782 percent Democratic registration, 55.836 percent Democratic registration, and 60.113 percent Democratic registration. *Id.*, Ex. O. Finally, District 12 was drawn to exclude precincts with 59.679

percent Democratic registration, 61.86 percent Democratic registration, 58.145 percent Democratic registration, 62.324 percent Democratic registration, 60.209 percent Democratic registration, 56.739 percent Democratic registration, 66.22 percent Democratic registration, 57.273 percent Democratic registration, 55.172 percent Democratic registration, and 63.287 percent Democratic registration, all in Guilford County. *Id.*, Ex. N.

On the North Carolina map, District 12 has an irregular shape and is barely contiguous in parts. Its Southwest corner lies in Mecklenburg County, very close to the South Carolina border, and includes parts of Charlotte. The District moves North through Rowan County and into Iredell County. There it juts West to pick up parts of the City of Statesville. More than 75 percent of the Statesville population that is included in District 12 is African-American, while only 18.88 percent of the population of Statesville excluded from District 12 is African-American. McGee Aff., Ex. L. From Statesville, the District moves East into Rowan County. There it dips to the South to include Salisbury, before turning to the Northeast and entering Davidson County and the City of Thomasville. Over 41 percent of the populations of Salisbury and Thomasville that are included in District 12 are African-American, while only 15.39 and 9.55 percent, respectively, of those that are excluded from the District are African American. *Id.* The District makes a northwesterly incursion into Forsyth County to include parts of Winston-Salem, where 77.39 percent of the population

within District 12 is African-American, and only 16.06 percent of the population left out is African-American. *Id.* The District moves to the East and narrows dramatically before opening up again to include the predominantly African-American parts of Greensboro, where the District ends.

Objective, numerical studies of the compactness of congressional districts are also available. In his report, "An Evaluation of North Carolina's 1998 Congressional Districts," Professor Gerald R. Webster, one of the Defendants' expert witnesses, presents statistical analyses of "comparator compactness indicators" for North Carolina's congressional districts under the 1997 plan. In measuring the districts' dispersion compactness[4] and perimeter compactness,[5] Professor Webster offers two of the "most commonly recognized and applied" compactness indicators. Webster, at 13 (citing Pildes & Niemi, Expressive Harms, "Bizarre Districts," and Voting Rights:

---

[4] "Dispersion compactness" measures the geographic "dispersion" of a district. To calculate this a circle is circumscribed around a district. The reported coefficient is the proportion of the area of the circumscribed circle which is also included in the district. This measure ranges from 1.0 (most compact) to 0. 0 (least compact). Webster, at 14.

[5] "Perimeter compactness" is based upon the calculation of the district's perimeter. The reported coefficient is the proportion of the area in the district relative to a circle with the same perimeter. This measure ranges from 1.0 (most compact) to 0.0 (least compact). Webster, at 14. The equation used here is (((4 x ∏) x Area of district) ÷ (District's Perimeter2)). Webster, at table 3.

Evaluating Election-District Appearances After *Shaw v. Reno*, 92 Mich. L. Rev. 483, 571-573, table 6 (1993) (hereinafter, "Pildes & Niemi"); *and see Bush v. Vera*, 517 U.S. 952, ___, 116 S. Ct. 1941, 1952, 135 L. Ed. 2d 248 (1996) (citing Pildes & Niemi compactness factors as supporting evidence for holding three Texas congressional districts unconstitutional).

In discussing the relative normalcy of various compactness measures, Pildes and Niemi suggest that a "low" dispersion compactness measure would be equal to or less than 0.15. Pildes & Niemi, at 564. They suggest that a "low" perimeter compactness measure is equal to or less than 0.05. *Id.* North Carolina's Twelfth Congressional District under the 1997 plan has a dispersion compactness indicator of 0.109 and a perimeter compactness indicator of 0.041. Webster, at table 3. These figures are much lower than the mean compactness indicators for North Carolina's twelve congressional districts under the 1997 plan. The average dispersion compactness indicator for the State is 0.354, and the average perimeter compactness indicator is 0.192. *Id.* The next lowest dispersion compactness indicator after District 12 is the 0.206 in the Fifth Congressional District, and the next lowest perimeter compactness indicator is the First Congressional District's 0.107. *Id.*

II. The First Congressional District

District 1 is another predominantly Democratic district established by the 1997 plan. Unlike District 12, it is a

majority-minority district, based on percentages of the total population of the District,[6] as 50.27 percent of its total population is African-Americans. *Id.*, Vol. I Commentary at 10. District 1 is composed of ten of the 22 counties split in drawing the statewide 12 district 1997 plan. Weber Dec. ¶16. Half of the twenty counties represented in District 1 are split. *Id.* Of the ten sub-divided counties assigned to District 1, four have parts with over 50 percent African-American population, four others have parts with over 40 percent African-American population, and two others have parts with over 30 percent African-American population. *Id.*, ¶17.

In each of the ten counties that are split between District 1 and an adjacent district, the percent of the population that is African-American is higher inside the district than it is outside the district, but within the same county. *Id.*, ¶19 and Table 2. The disparities are less significant than in the county splits involving District 12. *Id.*, Table 2. For example, where Beaufort County is split between Districts 1 and 3, 37.7 percent of the total population of Beaufort County allocated to District 1 is African-American, while 22.9 percent of the total population of Beaufort County assigned to District 3 is African-American.

---

[6] While 50.27 percent of the total population of District 1 is African-American, only 46.54 percent of the voting age population is African-American, based on the 1990 census data. Bartlett Aff., Vol. I Commentary at 10.

Similarly, nine of the 13 cities and towns split between District 1 and its neighboring districts are split along racial lines. *Id.*, ¶22. For example, where the City of New Bern is split between District 1 and adjacent District 3, 48.27 percent of the population assigned to District 1 is African-American, while 24.49 percent of the New Bern population assigned to District 3 is African-American. McGee Aff., Ex. L.

Viewed on the North Carolina map, District 1 is not as irregular as District 12. In the North, it spans 151.2 miles across, from Roxboro, Person County, in the West, to Sunbury, Gates County, in the East. Affidavit of Dr. Alfred W. Stuart ("Stuart Aff."), table 1. It is shaped roughly like the state of Florida, although the protrusion to the South from its "panhandle" is only approximately 150 miles long (to Goldsboro, Wayne County, with two irregularities jutting into Jones, Craven, and Beaufort Counties. Cooper Aff., attachments. These irregularities surround the peninsular extension of the Third Congressional District from the East, allowing the incumbent from the previous Third Congressional District to retain his residence within the boundaries of the same district, and avoiding placing two incumbents in District 1.

The "comparator compactness indicators" from District 1 are much closer to the North Carolina mean compactness indicators than are those from District 12. For example, District 1 has a dispersion compactness indicator of 0.317 and a perimeter compactness indicator of 0.107. Webster, at table

3. This dispersion compactness indicator is not significantly lower than the State's mean indicator of 0.354, and is higher than the dispersion compactness indicators of Districts 12 (0.109), 9 (0.292), and 5 (0.206). *Id.* It may be noted that Districts 5 and 9 are next to, and necessarily shaped by, District 12. District 1 has a perimeter compactness indicator of 0.107, which is lower than North Carolina's mean perimeter compactness indicator (0.192), but much higher than Pildes and Niemi's suggested "low" perimeter compactness indicator (0.05). District 1's perimeter compactness indicator is also much higher than that of District 12 (0.041). *Id.*

DISCUSSION

The Equal Protection Clause of the United States Constitution provides that no State "shall deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. 14, § 1. The United States Supreme Court explained in *Miller v. Johnson*, 515 U.S., at 904, 115 S. Ct., at 2482, that the central mandate of the Equal Protection Clause "is racial neutrality in governmental decisionmaking." Application of this mandate clearly prohibits purposeful discrimination between individuals on the basis of race. *Shaw v. Reno*, 509 U.S. 630, 642, 113 S. Ct. 2816, 2824, 125 L. Ed. 2d 511 (1993) ("*Shaw I*"), (citing *Washington v. Davis*, 426 U.S. 229, 239, 96 S. Ct. 2040, 2047, 48 L. Ed. 2d 597 (1976)).

As the Supreme Court recognized, however, the use of this principle in "electoral districting is a most delicate task." *Miller*, 515 U.S., at 905, 115 S. Ct., at 2483. Analysis of suspect districts must begin from the premise that "[l]aws that explicitly distinguish between individuals on racial grounds fall within the core of [the Equal Protection Clause's] prohibition." *Shaw I*, 509 U.S., at 642, 113 S. Ct., at 2824. Beyond that, however, the Fourteenth Amendment's prohibition "extends not just to explicit racial classifications," *Miller*, 515 U.S., at 905, 115 S. Ct., at 2483, but also to laws, neutral on their face, but "unexplainable on grounds other than race," *Arlington Heights v. Metropolitan Housing Development Corp*, 429 U.S. 252, 266, 97 S. Ct. 555, 564, 50 L. Ed. 2d 450 (1977).

In challenging the constitutionality of a State's districting plan, the "plaintiff bears the burden of proving the race-based motive and may do so either through 'circumstantial evidence of a district's shape and demographics' or through 'more direct evidence going to legislative purpose.' " *Shaw II*, 517 U.S., at ____, 116 S. Ct., at 1900 (quoting *Miller*, 515 U.S., at 916, 115 S. Ct., at 2488). In the final analysis, the plaintiff must show "that race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district." *Id.*, (quoting *Miller*, 515 U.S., at 916, 115 S. Ct., at 2488).

Once a plaintiff demonstrates that race was the predominant factor in redistricting, the applicable standard of review

of the new plan is "strict scrutiny." Thus, in *Miller* the Supreme Court held that strict scrutiny applies when race is the "predominant" consideration in drawing the district lines such that "the legislature subordinate[s] race-neutral districting principles . . . to racial considerations." 515 U.S., at 916, 115 S. Ct., at 2488. Under this standard of review, a State may escape censure while drawing racial distinctions only if it is pursuing a "compelling state interest." *Shaw II*, 517 U.S., at ___, 116 S. Ct., at 1902.

However, "the means chosen to accomplish the State's asserted purpose must be specifically and narrowly framed to accomplish that purpose." *Wygant v. Jackson Bd. of Ed.*, 476 U.S. 267, 280, 106 S. Ct. 1842, 1850, 90 L. Ed. 2d 260 (1986) (opinion of Powell, J.). As the Supreme Court required in *Shaw II*, where a State's plan has been found to be a racial gerrymander, that State must now "show not only that its redistricting plan was in pursuit of a compelling state interest, but also that its districting legislation is narrowly tailored to achieve that compelling interest." 517 U.S., at ___, 116 S. Ct., at 1902.

We are cognizant of the principle that "redistricting and reapportioning legislative bodies is a legislative task which the federal courts should make every effort not to preempt." *Wise v. Lipscomb*, 437 U.S. 535, 539, 98 S. Ct. 2493, 2497, 57 L. Ed. 2d 411 (1978) (citations omitted). "A State should be given the opportunity to make its own redistricting decisions so

long as that is practically possible and the State chooses to take the opportunity. When it does take the opportunity, the discretion of the federal court is limited except to the extent that the plan itself runs afoul of federal law." *Lawyer v. Dep't of Justice*, ___ U.S. ___, ___, 117 S. Ct. 2186, 2193, 138 L. Ed. 2d 669 (1997) (internal citations omitted). Thus, when the federal courts declare an apportionment scheme unconstitutional-as the Supreme Court did in *Shaw II*-it is appropriate, "whenever practicable, to afford a reasonable opportunity for the legislature to meet constitutional requirements by adopting a substitute measure rather than for the federal court to devise and order into effect its own plan. The new legislative plan, if forthcoming, will then be the governing law unless it, too, is challenged and found to violate the Constitution." *Wise*, 437 U.S., at 540, 98 S. Ct., at 2497.

I. The Twelfth Congressional District

As noted above, the final decision of the three-judge panel in *Shaw* only approved the 1997 Congressional Redistricting Plan "as an adequate remedy for the specific violation of the individual equal protection rights of those plaintiffs who successfully challenged the legislature's creation of former District 12." *Shaw v. Hunt*, No. 92-202-CIV-5-BR, at 8 (E.D.N.C. Sept. 12, 1997). In the instant case, we are faced with a ripe controversy as to the newly-configured Twelfth Congressional District. This panel must thus decide whether, as a matter of law, District 12 violates the equal protection

rights of the Plaintiffs who live within the district and challenge its constitutionality.

In holding that District 12 under the 1992 plan was an unconstitutional racial gerrymander, the Supreme Court in *Shaw II* noted, "[n]o one looking at District 12 could reasonably suggest that the district contains a 'geographically compact' population of any race." 517 U.S., at ___, 116 S. Ct., at 1906. The *Shaw II* Court thus struck the old District 12 as unconstitutional as a matter of law. In redrawing North Carolina's congressional districts in 1997 the General Assembly was, of course, aware that District 12 under the 1992 plan had been declared unconstitutional; curing the constitutional deficiencies was one of the legislature's declared goals for the redistricting process. Cooper Aff. ¶¶5, 8, 10, 14.

Defendants now argue that the changes in District 12 between the 1992 and 1997 plans are dramatic enough to cure it of its constitutional defects. They point to the fact that the new District 12 has lost nearly one-third (31.6 percent) of the population from the 1992 district and nearly three-fifths (58.4 percent) of the land. These numbers do not advance the Defendants' argument or end the Court's inquiry. As Defendants themselves note, the Court's role is limited to determining "whether the proffered remedial plan is legally unacceptable because it violates anew constitutional or statutory voting rights-that is, whether it fails to meet the same standards applicable to an original challenge of a legislative plan in

place." *McGhee v. Granville County*, 860 F.2d 110, 115 (4th Cir. 1988) (citing *Upham v. Seamon*, 456 U.S. 37, 42, 102 S. Ct. 1518, 1521, 71 L. Ed. 2d 725 (1982)). A comparison of the 1992 District 12 and the present District is of limited value here. The issue in this case is whether District 12 in the present plan violates the equal protection rights of the voters residing within it.

In *Shaw I*, the Supreme Court described old District 12 as "unusually shaped. It is approximately 160 miles long and for much of its length, no wider than the [Interstate]-85 corridor. It winds in snake-like fashion through tobacco country, financial centers, and manufacturing areas until it gobbles in enough enclaves of black neighborhoods." 509 U.S., at 635-636, 113 S. Ct., at 2820-2821 (internal quotations omitted). Viewed without reference to District 12 under the 1992 plan, the new District 12 is also "unusually shaped." While its length has been shortened to approximately 95 miles, it still winds its way from Charlotte to Greensboro along the Interstate-85 corridor, making detours to pick up heavily African-American parts of cities such as Statesville, Salisbury, and Winston-Salem. It also connects communities not joined in a congressional district, other than in the unconstitutional 1992 plan, since the whole of Western North Carolina was one district, nearly two hundred years ago. Pl.'s Brief Opp. Def.'s Mot. S.J., at 12.

As noted above, where cities and counties are split between District 12 and neighboring districts, the splits are exclusively along racial lines, and the parts of the divided cities and counties having a higher proportion of African-Americans are always included in District 12. Defendants argue that the Twelfth has been designed with politics and partisanship, not race, in mind. They describe the District as a "Democratic island in a Republican sea," and present expert evidence that political identification was the predominant factor determining the border of District 12. Affidavit of David W. ("Peterson Aff."), at 2. As the uncontroverted material facts demonstrate, however, the legislators excluded many heavily-Democratic precincts from District 12, even though those precincts immediately border the District. The common thread woven throughout the districting process is that the border of District 12 meanders to include nearly all of the precincts with African-American population proportions of over forty percent which lie between Charlotte and Greensboro, inclusive.

As noted above, objective measures of the compactness of District 12 under the 1997 plan reveal that it is still the most geographically scattered of North Carolina's congressional districts. When compared to other previously challenged and reconstituted congressional districts in North Carolina, Florida, Georgia, Illinois, and Texas, District 12 does not fare well. The District's dispersion and perimeter compactness indicators (0.109 and 0.041, respectively) are lower than those values for North Carolina's District 1 (0.317 and 0.107 under the 1997 plan). Similarly, the District suffers in comparison to Florida's District 3 (0.136 and 0.05), Georgia's District 2 (0.541 and 0.411) and District 11 (0.444 and 0.259), Illinois' District 4 (0.193 and 0.026), and Texas District 18 (0.335 and 0.151), District 29 (0.384 and 0.178), and District 30 (0.383 and 0.180).

Rule 56(c) of the Federal Rules of Civil Procedure provides that summary judgment shall be granted if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. The moving party must demonstrate the lack of a genuine issue of fact for trial, and if that burden is met, the party opposing the motion must show evidence of a genuine factual dispute. *Celotex Corp. v. Catrett*, 477 U.S. 317, 324, 106 S. Ct. 2548, 2553, 91 L. Ed. 2d 265 (1986).

Based on the uncontroverted material facts before it, the Court concludes that the General Assembly, in redistricting, used criteria with respect to District 12 that are facially race driven. District 12 was drawn to collect precincts with high racial identification rather than political identification. Further, the uncontroverted material facts demonstrate that precincts with higher partisan representation (that is, more heavily Democratic precincts) were bypassed in the drawing of District 12 and included in the surrounding congressional districts. The legislature disregarded traditional districting criteria such as contiguity, geographical integrity, community

of interest, and compactness in drawing District 12 in North Carolina's 1997 plan. Instead, the General Assembly utilized race as the predominant factor in drawing the District, thus violating the rights to equal protection guaranteed in the Constitution to the citizens of District 12.[7]

To remedy these constitutional deficiencies, the North Carolina legislature must redraw the 1997 plan in such a way that it avoids the deprivation of the voters' equal protection rights not to be classified on the basis of race. This mandate of the Court leaves the General Assembly free, within its authority, to use other, proper factors in redrawing the 1997 plan. Among these factors, the legislature may consider traditional districting criteria, including incumbency considerations, to the extent consistent with curing the constitutional defects. *See Shaw II*, 517 U.S., at ___, 116 S. Ct., at 1901 (describing "race-neutral, traditional districting criteria").

II. First Congressional District

Based on the record before us, the Plaintiff has failed to establish that there are no contested material issues of fact that would entitle Plaintiff to judgment as a matter of law as to District 1. The Court thus denies Plaintiffs' Motion for Sum-

[7] The Supreme Court has indicated that, when drawing congressional districts, race may not be used as a proxy for political characteristics. *Vera v. Bush*, 517 U.S. 952, ___, 116 S. Ct. 1941, 1956, 135 L. Ed. 2d 248 (1996).

mary Judgment as to that District. Conversely, neither has the Defendant established the absence of any contested material issue of fact with respect to the use of race as the predominant factor in the districting of District 1 such as would entitle Defendant to judgment as a matter of law.

CONCLUSION

Based on the Order of this Court entered on April 3, 1998, and the foregoing analysis, Defendants will be allowed the opportunity to correct the constitutional defects in the 1997 Congressional Redistricting Plan, in default of which the Court would undertake the task.

This Memorandum Opinion, like the Order to which it refers, is entered by a majority of the three-judge panel. Circuit Judge Sam J. Ervin, III, dissents.

This, the 14th day of April, 1998.

TERRENCE W. BOYLE
Chief United States District Judge
RICHARD L. VOORHEES
United States District Judge

/s/ TERRENCE W, BOYLE
Chief United States District Judge

[This page intentionally left blank]

[Caption Omitted in Printing]

DISSENT

ERVIN, Circuit Judge, dissenting:

In *Shaw v. Reno*, the Supreme Court recognized a new cause of action in voting rights law -- that state legislatures could not subordinate traditional districting principles to racial considerations in drawing legislative districts without triggering strict scrutiny under the Equal Protection Clause of the Fourteenth Amendment, 509 U.S. 630 (1993) (*"Shaw I"*). Because the districting plan before us is fundamentally different from the plans struck down by the Court in *Shaw I* and its progeny, *see Miller v. Johnson*, 515 U.S. 900 (1995); *Shaw v. Hunt*, 517 U.S. 899, 135 L. Ed. 2d 207 (1996) (*"Shaw II"*); *Bush v. Vera*, 517 U.S. 952, 135 L. Ed. 2d 248 (1996), I do not believe that the Plaintiffs have proven any violation of their right to the equal protection of the laws.

North Carolina's twelfth congressional district is not a majority-minority district, it was not created as a result of strong-arming by the U.S. Department of Justice, and, contrary to the majority's assertions, it is not so bizarre or unusual in shape that it cannot be explained by factors other than race. The Plaintiffs' evidence is not so convincing as to undermine the State's contention that the 1997 Plan was motivated by a desire to remedy the constitutional violations from the 1992 Plan, to preserve the even split between Republicans and

Democrats in the North Carolina congressional delegation, and to protect incumbents by drawing the districts so that each incumbent resides in a separate district. Our acceptance of the State's proffered justifications, absent more rigorous proof by the Plaintiffs, is especially appropriate in this context, considering the deference that we are bound to accord state legislative decisions in questions of redistricting. Finally, I find it inconsistent to decide, as the majority has done today, that the General Assembly, while engaging in a state-wide redistricting process, was impermissibly influenced by predominantly racial considerations in the drawing of one district (the twelfth) while evidencing no such unconstitutional predilection in the other district under challenge (the first), or for that matter, any of North Carolina's other ten congressional districts. For these reasons, I must respectfully dissent.

I.

In order to prevail on a race-predominance claim, the Plaintiffs must show "that race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district." *Miller*, 515 U.S. at 916. The principle that race cannot be the predominant factor in a legislature's redistricting calculus is simple. Applying that principle, on the other hand, is quite complex, because numerous factors influence a legislature's districting choices and no one factor may readily be identified as predominant.

In undertaking this analysis, it is crucial to note that in the matter of redistricting, courts owe substantial deference to the legislature, which is fulfilling "the most vital of local functions" and is entrusted with the "discretion to exercise the political judgment necessary to balance competing interests." *Miller*, 515 U.S. at 915. We presume the legislature acted in good faith absent a sufficient showing to the contrary. *Id.* A state's redistricting responsibility "should be accorded primacy to the extent possible when a federal court exercises remedial power." *Lawyer v. Department of Justice*, 138 L. Ed. 2d 669, 680 (1997).

While the majority and I appear to be in agreement on those general principles, the majority does not discuss the extent of Plaintiffs' burden in proving a claim of racial gerrymandering. Concurring in *Miller v. Johnson*, Justice O'Connor emphasized that the plaintiff's burden in cases of this kind must be especially rigorous:

> I understand the threshold standard the Court adopts . . . to be a demanding one. To invoke strict scrutiny, a plaintiff must show that the State has relied on race in *substantial disregard* of customary and traditional districting practices. . . . [A]pplication of the Court's standard helps achieve *Shaw*'s basic objective of making *extreme instances* of gerrymandering subject to meaningful judicial review.

Miller, 515 U.S. at 928-29 (O'Connor, J., concurring) (emphasis added). This principle was recently developed by a three-judge panel that upheld Ohio's 1992 redistricting plan for its state legislature:

> As we apply the threshold analysis developed by the Supreme Court in *Shaw* cases, we are mindful of the dangers that a low threshold (easily invoking strict scrutiny) poses for states. We therefore follow Justice O'Connor's lead in applying a *demanding threshold* that allows states some degree of latitude to consider race in drawing districts.

Quilter v. Voinovich, 981 F. Supp. 1032, 1044 (N.D. Ohio 1997), *aff'd*, 66 U.S.L.W. 3639 (U.S. Mar. 30, 1998) (No. 97-988).

The Court has recognized that legislatures often have "mixed motives" -- they may intend to draw majority-minority districts as well as to protect incumbents or to accommodate other traditional interests. *Bush v. Vera*, 135 L. Ed. 2d at 257. In such a case, courts must review extremely carefully the evidence presented in order to determine whether an impermissible racial motive predominated. A determination that a state has relied on race in substantial disregard of customary and traditional districting practices will trigger strict scrutiny, though strict scrutiny does not apply merely because redistricting is performed with consciousness of race. *Id.* Plaintiffs may show that race predominated either through direct evidence of legislative intent or through circumstantial evidence, such as the extremely contorted nature of a district's shape and its racial demographics. *Shaw II*, 135 L. Ed. 2d at 218-219; *Miller*, 515 U.S. at 916.

The Plaintiffs have presented no direct evidence that the General Assembly's intent was to draw district lines based on race. In contrast to the redistricting plans at issue in North Carolina in *Shaw II*, in Texas in *Bush v. Vera*, and in Georgia in *Miller v. Johnson*, the 1997 Plan was not drawn with an articulated desire to maximize minority voting participation. In order to succeed on summary judgment, the Plaintiffs must therefore present circumstantial evidence that the State not only showed substantial disregard for traditional districting principles, but that the predominant factor in the legislature's decision to act as it did was race.

II.

The State has asserted that several criteria were more important than race in the General Assembly's creation of the 1997 Redistricting Plan. The General Assembly drew the 1997 Plan to remedy the constitutional violations in the 1992 Plan, to preserve North Carolina's partisan balance of six Republicans and six Democrats, and to avoid placing two incumbents in the same district. *See Defendants' Br. in Support of Sum-*

mary Judgment at 4-7 ("*Defendants' Br.*"). In order to grant Plaintiffs the relief they seek, they must prove that the state has substantially disregarded these proffered redistricting criteria, as well as other traditional districting criteria, in favor of race. I believe that the Plaintiffs have failed to meet this burden.

First and foremost, the districts at issue here are not majority-minority districts.[1] I find it of utmost importance that only 43.36% of the voting-age population in District 12 is African-American. This fact immediately distinguishes this case from the line of Supreme Court cases that have struck down racial gerrymandering in North Carolina, Florida, Georgia, Louisiana, and Texas -- cases that define the equal protection inquiry in this area. The Court itself recognized this distinction when it recently upheld a Florida state senate district

---

[1] The Supreme Court has not articulated whether a district is designated majority-minority by reference to voting-age population, by reference to overall population, or by reference to voter registration. Voting-age population would seem to be the appropriate benchmark. All people of voting age have the capacity to influence elections, whereas those under voting age obviously cannot. Counting only registered voters would potentially undercount those with the potential to influence elections.

In District 12, 43.36% of the voting-age population is black, while 46.67% of the total population is black. In District 1, 46.57% Of the voting-age population is black, while 50.27% of the total population is black. Under none of the possible criteria, then, can District 12 be considered a majority-minority district. District 1 can only be considered a majority-minority district with reference to total population. *See Defendants' Br.* at 6.

that was not a majority-minority district. *See Lawyer*, 138 L. Ed. 2d at 680 (upholding state senate district with 36.2% black voting-age population); *see also Quilter v. Voinovich*, 66 U.S.L.W. 3639 (U.S. Mar. 30, 1998) (No. 97-988) (affirming decision of three-judge panel that rejected a racial gerrymandering challenge to Ohio legislative districts that were not majority-minority).

In its racial composition, District 12 is no different from every one of North Carolina's other eleven congressional districts: the majority of the voting-age population in the district is white. While this may not be dispositive of the question whether race was the predominant factor in the legislature's redistricting plan, the fact that all of North Carolina's congressional districts are majority-white at the very least makes the Plaintiffs' burden, which is already quite high, even more onerous. Had the legislature been predominantly influenced by a desire to draw District 12 according to race, I suspect it would have created a district where more than 43% of the voting-age population was black. In part because District 12 is not a majority-minority district, I find no reason to credit the Plaintiffs' contention that race was the predominant factor in the legislature's decisions. This is especially true considering that the legislature has proffered several compelling, non-racial factors for its decision.

Second, this case is readily distinguishable from previous racial gerrymandering case because the plan at issue

is not the result of North Carolina's acquiescence to pressure from the U.S. Justice Department, acting under its Voting Rights Act preclearance authority. In previous cases in which the Court struck down challenged districts, the legislatures drew the challenged plans after their initial plans had been denied preclearance by the Department of Justice under its "black-maximization" policy. *See Miller*, 515 U.S. at 921. For example, in *Miller*, the Court found that the creation of the unconstitutional district was in direct response to having had two previous plans denied preclearance by the Justice Department. *See id.* ("There is little doubt that the State's true interest in designing the Eleventh District was creating a third majority-minority district to satisfy the Justice Department's preclearance demands."). In *Shaw II*, the Court recognized that North Carolina decided to draw two majority-minority districts in response to the Justice Department's denial of preclearance to a previous plan. *Shaw II*, 135 L. Ed. 2d at 219 (noting that the "*overriding* purpose [of the redistricting plan] was to comply with the dictates of the Attorney General's Dec. 18, 1991 letter [denying preclearance to previous plan] and to create two congressional districts with effective black voting majorities") (quotation omitted).

In contrast, while the Department of Justice granted preclearance to the plan at issue in this case, the Department did not engage in the kind of browbeating that the Supreme Court has found offensive in previous racial gerrymandering cases. In the cases I have cited, the Court relied on this direct

evidence, that the legislature was primarily motivated by race, to invoke strict scrutiny of the challenged districts. Unlike those cases, Plaintiffs have proffered neither direct nor circumstantial evidence that the General Assembly was pressured by the Department of Justice to maximize minority participation when it redrew the congressional districts in 1997. In the absence of such evidence, I have little reason to believe that the State is less than candid in its averments to this court that race was not the predominant factor used by the legislature when crafting the 1997 redistricting plan.

In reaching its decision, the majority has relied heavily on evidence that District 12 could have been drawn to include more precincts where a majority of registered voters are Democrats, but that it was not so drawn, presumably for reasons that can be predominantly explained on no other basis but race. I cannot agree with the majority's interpretation of the evidence. The Plaintiffs, and the majority opinion, provide anecdotal evidence that certain precincts that border District 12, but were not included in that district, have a high number of voters that are registered Democrats. *See supra* at 8-9. This evidence does not take into account, however, that voters often do not vote in accordance with their registered party affiliation. The State has argued, and I see no reason to discredit their uncontroverted assertions, that the district lines were drawn based on votes for Democratic candidates in *actual elections*, rather than the number of registered voters. *See* Affidavit of Senator Roy A. Cooper, III ("Cooper Aff.") ¶8 ("election

results were the principal factor which determined the location and configuration of all districts").

The majority's evidence also ignores the simple fact that the redistricting plan must comply with the equal protection principle of "one person, one vote." Every voter must go somewhere, yet all districts must remain relatively equal in population. Plaintiffs' anecdotal evidence suggests that Democratic precincts could have been included in District 12 in certain areas, had the district only been enlarged to include those places. By necessity, however, the district would need to have been reduced in size in other places in order to accommodate the increase in the overall population in the district. Had the State drawn the lines in the manner that Plaintiffs' evidence implies it should have, it appears that the State simply would have traded a Democratic precinct in one part of the district for a Democratic precinct in another part. Perhaps such line-drawing would have satisfied the Plaintiffs' desire that District 12 contain more than a 57% white majority, but I do not agree with the majority that the Constitution requires it.

In contrast to Plaintiffs' anecdotal evidence (which is presented in an affidavit by Plaintiffs' counsel), the State has presented far more convincing evidence that race was not the predominant factor in the General Assembly's decision to draw District 12 as it has been drawn. *See* Affidavit of Dr. David W. Peterson ("Peterson Aff."). In his statistical analysis, Professor Peterson traveled the entire circumference of District 12,

looking at both the party affiliation and racial composition of the precincts on either side of the district line. Based on an analysis of the entire district, Professor Peterson concluded that "the path taken by the boundary of the Twelfth District can be attributed to political considerations with at least as much statistical certainty as it can be attributed to racial considerations." Peterson Aff. ¶3. In other words, examining the entire circumference of District 12, rather than relying on Plaintiffs' "pick and choose" examples, there is no statistical evidence to support the conclusion that race was the General Assembly's primary motive in drawing District 12.

Furthermore, the majority sees fit to ignore evidence demonstrating that not only did the legislature utilize traditional race-neutral districting principles in drawing the Twelfth District's lines, but that these principles predominated over any racial considerations. According to the Supreme Court, these "race-neutral" principles include, but are not limited to: compactness, contiguity, respect for political subdivisions or communities of interest, and incumbency protection. *See Bush v. Vera*, 135 L. Ed. 2d at 260; *Miller*, 515 U.S. at 916. The majority would apparently add "geographical integrity" to this list, although I am not clear what exactly they mean by that.[2]

---

[2] The term "geographical integrity" does not appear in any of the Supreme Court's voting rights cases, and the only lower court case that expressly uses the term, *DeWitt v. Wilson*, 856 F. Supp. 1409, 1411 (E.D. Cal. 1994), did so only because it was a standard set out in the state's

(continued...)

See supra at 22. Regardless of what is included on the list, however, the fact remains that the legislature relied more heavily on these neutral principles than on race when it chose the boundaries of District 12.

The compactness of District 12 is, admittedly, substantially less than what has been deemed to be "ideal" and is the least compact of all of North Carolina's twelve congressional districts. *See supra* at 11 (citing Pildes & Niemi "compactness factors"). Some district, however, must inevitably be the least compact; that fact alone therefore is not dispositive. And because District 12 reflects the paths of major interstate highway corridors which make travel within the district extremely easy, it has a type of "functional compactness" that is not necessarily reflected by the Pildes & Niemi factors. In addition, District 12 as it currently stands is contiguous. Contrary to the majority's allusions to "narrow corridors," *see supra* at 7, the width of the district is roughly equal throughout its length, *see* Affidavit of Dr. Gerald R. Webster tbl. 1.

District 12 also was designed to join a clearly defined "community of interest" that has sprung up among the inner-cities and along the more urban areas abutting the interstate highways that are the backbone of the district. I do not see how anyone can argue that the citizens of, for example, the inner-

---

[2] (...continued)
constitution.

city of Charlotte do not have more in common with citizens of the inner-cities of Statesville and Winston-Salem than with their fellow Mecklenburg county citizens who happen to reside in suburban or rural areas.

The tricky business of drawing borders to protect incumbents also required the legislature to draw District 12 in the way it did. District 12 had to be drawn in a manner that avoided placing both Congressman Burr's and Coble's residences inside the district, excluded Cabarrus County, where Congressman Hefner resides, and still provided enough Democratic votes to protect incumbent Congressman Watt's seat. *See* Cooper Aff. ¶10.

What I find to be the predominating factors in drawing the 1997 Plan, however, were the legislature's desire to maintain the 6-6 partisan balance in the House and to protect incumbents. *See* Cooper Aff. ¶ 8 (stating maintaining partisan balance was the principal factor driving redistricting). These are legitimate interests which have been upheld by the Supreme Court in previous voting rights cases, *see*, *e.g.*, *Bush v. Vera*, 135 L. Ed. 2d at 260-61, and were proper concerns for the legislature here. As I noted before, the majority's decision to look only at the percentage of registered Democrats in analyzing the district's borders ignores the fact that registered Democrats are not compelled to vote for Democratic candidates and often do not. In drawing District 12, therefore, the legislature did not consider merely the number of registered Demo-

crats, rather it looked also to the history of recent voting patterns in an attempt to design the districts to ensure that the partisan balance would remain stable. *See* Cooper Aff. ¶ 8; Peterson Aff. ¶ 21.

Finally, I find it highly unlikely, as the majority has found today, that the General Assembly acted with predominantly racial motives in its drawing of District 12, but did not act with the same motive in its drawing of District 1. The General Assembly considered the 1997 Redistricting Plan as a single, statewide proposal, and it makes little sense to me that the General Assembly would have been animated by predominantly racial motives with respect to the Twelfth District and not the First. This inconsistency is even more apparent when one considers that the legislature placed *more* African-Americans in District 1 (46.54% of the voting-age population) than in District 12. Since we all agree that the Plaintiffs have failed to prove any equal protection violation with respect to the legislature's decision in drawing District 1, I find it unlikely that Plaintiffs' proof would demonstrate otherwise with regard to other aspects of the same redistricting plan.

III.

Not only do I disagree with the majority in their holding the Twelfth District unconstitutional, I believe that -- even if the Twelfth District is unconstitutional -- they are in error in enjoining the current election process, which is already substantially underway. The rationale for allowing elections to proceed after a court has declared them to be constitutionally infirm has been clearly articulated by the Supreme Court in *Reynolds v. Sims*, 377 U.S. 533, 585 (1964):

> [O]nce a State's legislative apportionment scheme has been found to be unconstitutional, it would be the unusual case in which a court would be justified in not taking appropriate action to insure that no further elections are conducted under the invalid plan. However, under certain circumstances, such as where an impending election is imminent and a State's election machinery is already in progress, equitable considerations might justify a court in withholding the granting of immediately effective relief in a legislative apportionment case, even though the existing apportionment scheme was found invalid. In awarding or withholding immediate relief, a court is entitled to and should consider the proximity of a forthcoming election and the mechanics and complexities of

> state election laws, and should act and rely upon general equitable principles. With respect to the timing of relief, a court can reasonably endeavor to avoid a disruption of the election process which might result from requiring precipitate changes that could make unreasonable or embarrassing demands on a State in adjusting to the requirements of the court's decree.

Weighing the equities here, it is clear that this is one of the "unusual" cases contemplated by *Reynolds v. Sims* and therefore an injunction should not be issued at this point in the election cycle.

On January 30, 1998, when the Plaintiffs filed their motion for a preliminary injunction to these elections, the deadline for candidates to file for the primary elections was only four days away. Voters had already contributed over $3 million to the congressional candidates of their choice, and the candidates themselves had spent approximately $1.5 million on their campaigns. *See* Second Affidavit of Gary O. Bartlett ("Bartlett Second Aff.") ¶ 14 (giving figures for the period from July 1 to December 31, 1997). Ballots have already been prepared, printed, and distributed. Absentee balloting for the primary elections began on March 16, 1998 and undoubtedly some voters have already cast their votes. The primary elections themselves are scheduled for May 5, only a few short

weeks away. This court's injunction therefore wreaks havoc on an electoral process that is in full swing.

An injunction puts the North Carolina legislature on the horns of a dilemma. It may choose to run the May 1998 elections as scheduled for everything but the congressional primaries, and then spend millions of dollars scheduling a separate election for the congressional primaries[3] -- an election for which few people are likely to make a special trip to the election booth. Or the State may decide to spend millions of dollars to reschedule the entire May election and affect hundreds of races for offices throughout the State. Forcing the State to choose between these two equally unpalatable choices is unreasonable.

In addition, the injunction will disrupt candidates' campaigning and voter contributions to those campaigns. Redrawing the Twelfth District's boundaries will inevitably change the boundaries of the surrounding districts, and the ripple effects of this redrawing may well affect many other districts in the State, as happened when the 1997 Plan supplanted the 1992 Plan. Congressional candidates cannot be certain whom they will represent or who their opponents will be until the districts are redrawn. Voters likewise will be unsure whether the candidates of their choice will end up in

---

[3] The cost of a single, statewide election, primary or general, is said to be $4,300,000. *See* Bartlett Second Aff. ¶ 13.

their district. Not only will contributions to candidates and campaigning by candidates be slowed, if not halted, while the redistricting takes place, but once the redistricting is completed, candidates and voters will have scant time to become acquainted with each other before elections take place. *See McKee v. James*, CV-97-C-2078-W (N.D. Ala. March 24, 1998) (refusing to enjoin elections even though qualifying date for primary had not yet passed because "[s]ome energy is already invested; some persons have declared their candidacy to represent a certain districts. . . Even if redistricting were carried out today, it would disturb the expectations of candidates and their supporters, and it would disrupt the state's conduct of the primaries."); *Smith v. Beasley*, 946 F. Supp. 1174, 1212 (D.S.C. 1996) (refusing to issue injunction six weeks before general election when "[c]andidates have already spent significant time and money campaigning, and voters have begun to familiarize themselves with the candidates" because delay would disrupt elections unnecessarily and confuse voters). *Accord Vera v. Richards*, 861 F. Supp. 1304, 1351 (S.D. Tex. 1994), *affirmed sub nom. Bush v. Vera*, 135 L. Ed. 2d 245 (1996) (finding congressional districts unconstitutional eleven weeks before general elections but allowing them to proceed under unconstitutional apportionment plan). This will negatively affect the quality of the representation that citizens of North Carolina receive in Congress, and counsels against upsetting the current elections.

IV.

In its opinion, the majority concludes that neither the Plaintiffs nor the State has established the absence of a genuine issue of material fact that would entitle either party to judgment as a matter of law. *See supra* at 22-23. I believe that all material facts concerning the First District are uncontroverted -- this panel received the same evidence concerning District 1 as it did for District 12. If summary judgment is appropriate for District 12. I see no reason why District 1's constitutionality cannot be decided on summary judgment as well. The majority is simply wrong to require the State to establish the absence of an issue of material fact. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986) ("[W]e do not think . . . that the burden is on the party moving for summary judgment to produce evidence showing the absence of a genuine issue of material fact. . . ."). Because I believe that the Plaintiffs have failed to demonstrate that the First Congressional District under the 1997 Congressional Restricting [sic] Plan is an unconstitutional classification based on race, I would grant the State's motion for summary judgment.

V.

I agree with the majority that Plaintiffs have failed to meet their burden on summary judgment as to District 1, although I would go further and grant the State's motion for summary judgment as to this district. I dissent from the majority's

DISSENT, CONTINUED . . .

decision granting the Plaintiffs' motion for summary judgment on District 12, and enjoining elections under the 1997 Plan. For the reasons stated above, I would grant the State's motion for summary judgment, finding that Plaintiffs have not proven a violation of their right to equal protection of the laws.

ORDER AND PERMANENT INJUNCTION OF UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA, APRIL 3, 1998

[Caption Omitted in Printing]

ORDER AND PERMANENT INJUNCTION

THIS MATTER is before the Court on Plaintiffs' motion for preliminary injunction, Plaintiffs' motion for summary judgment, and Defendants' motion for summary judgment.

Following a hearing on Tuesday, March 31, 1998, the Court took these motions under advisement and now issues the following ruling:

1) Finding that the Twelfth Congressional District under the 1997 North Carolina congressional redistricting plan is unconstitutional, the Court hereby GRANTS Plaintiffs' motion for summary judgment as to the Twelfth Congressional District.

2) Based upon the Court's finding that the Twelfth Congressional District is unconstitutional, it is further ORDERED that Plaintiffs' motion for a preliminary injunction and Plaintiff's request for a permanent injunction as contained in its complaint are GRANTED. Defendants are hereby ENJOINED from conducting any primary or general election for

congressional offices under the redistricting plan enacted as 1997 N.C. Session Laws, Chapter 11.

3) It is further ORDERED that the parties file a written submission no later than Wednesday, April 8, 1998, addressing the following issues:

a) An appropriate time period within which the North Carolina General Assembly may be allowed the opportunity to correct the constitutional defects in the 1997 plan, in default of which the Court would undertake the task.

b) A proposed election schedule to follow redistricting which provides for a primary election process culminating in a general congressional election to be held on Tuesday, November 3, 1998.

This order and permanent injunction are entered by a majority of the three-judge panel. Circuit Judge Sam J. Ervin, III, dissents. Memoranda with reference to this order will be issued as soon as possible.

THIS the third day of April, 1998.

/s/ Terrence W. Boyle
Chief United States District Judge

[Caption Omitted in Printing]

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that defendants appeal to the Supreme Court of the United States from the April 3, 1998 final order of the three-judge district court declaring District 12 in North Carolina's 1997 Congressional Redistricting Plan unconstitutional and permanently enjoining the defendants from conducting any primary or general election under that plan.

This appeal is taken pursuant to 28 U.S.C. §1253.

NOTICE OF APPEAL, APRIL 6, 1998, CONTINUED . . .

This the 6th day of April, 1998.

MICHAEL F. EASLEY
ATTORNEY GENERAL

/s/ Edwin M. Speas, Jr.
Senior Deputy Attorney General

/s/ Tiare B. Smiley
Special Deputy Attorney General

/s/ Norma S. Harrell
Special Deputy Attorney General

N.C. Department of Justice
P.O. Box 629
Raleigh, N.C. 27602
(919) 716-6900

[Certificate of Service Omitted in Printing]

JUDGMENT OF UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA, APRIL 6, 1998

[Caption Omitted in Printing]

JUDGMENT

Decision by Court. This action came to trial or hearing before the Three Judge Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED, ADJUDGED AND DECREED that the Court GRANTS Plaintiffs' motion for summary judgment as to the Twelfth Congressional District.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Plaintiffs' motion for a preliminary injunction and Plaintiffs' request for a permanent injunction are GRANTED. Defendants are hereby **ENJOINED** from conducting any primary or general election for congressional offices under the redistricting plan enacted as 1997 N.C. Session Laws, Chapter 11.

JUDGMENT OF APRIL 6, 1998, CONTINUED . . .

THIS JUDGMENT FILED AND ENTERED ON APRIL 6, 1998 & COPIES TO:

Robinson Everett, Esq.
P.O. Box 586
Durham, NC 27702

Martin McGee, Esq.
P.O. Box 810
Concord, NC 28026 0810

Edwin M. Speas, Jr., Esq.
P.O. Box 629
Raleigh, NC 27602

April 6, 1998

DAVID W. DANIEL, CLERK
/s/ Jolie Skinner
(By) Deputy Clerk

AMENDED NOTICE OF APPEAL, APRIL 8, 1998

[Caption Omitted in Printing]

AMENDED NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Amended notice is hereby given that defendants appeal to the Supreme Court of the United States from the April 3, 1998 final order of the three-judge district court *and* the judgment entered April 6, 1998 declaring District 12 in North Carolina's 1997 Congressional Redistricting Plan unconstitutional and permanently enjoining the defendants from conducting any primary or general election under that plan.

This appeal is taken pursuant to 28 U.S.C. §1253.

AMENDED NOTICE OF APPEAL, CONTINUED . . .

This the 8th day of April, 1998.

MICHAEL F. EASLEY
ATTORNEY GENERAL

/s/ Edwin M. Speas, Jr.
Senior Deputy Attorney General

/s/ Tiare B. Smiley
Special Deputy Attorney General

/s/ Norma S. Harrell
Special Deputy Attorney General

N.C. Department of Justice
P.O. Box 629
Raleigh, N.C. 27602
(919) 716-6900

[Certificate of Service Omitted in Printing]

JUDGMENT OF UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA, APRIL 14, 1998

[Caption Omitted in Printing]

JUDGMENT

Decision by Court. This action came to trial or hearing before the Three Judge Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED, ADJUDGED AND DECREED that the Plaintiff's Motion for Summary Judgment as to District 1 is DENIED.

THIS JUDGMENT FILED AND ENTERED ON APRIL 14, 1998 & COPIES TO:

Robinson Everett, Esq.
P.O. Box 586
Durham, NC 27702

Edwin M. Speas, Jr., Esq.
P.O. Box 629
Raleigh, NC 27602

Martin McGee, Esq.
P.O. Box 810
Concord, NC 28026 0810

April 14, 1998

DAVID W. DANIEL, CLERK
/s/ Jolie Skinner
(By) Deputy Clerk

[This page intentionally left blank]

ORDER OF UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA, APRIL 21, 1998

[Caption Omitted in Printing]

ORDER

This matter is before the Court on the parties' responses to the Court's April 3, 1998, Order which directed the Defendants to propose a schedule for redrawing the 1997 North Carolina Congressional Redistricting Plan (the "1997 plan") and for holding congressional primaries and general elections this year. Having considered the parties' arguments, the Court hereby ORDERS:

1. On or before Friday, May 22, 1998, the North Carolina General Assembly will enact legislation revising the 1997 plan and submit copies to the Court, along with indications with respect to any possible gubernatorial veto thereof. If the General Assembly does not revise the plan by that time, the Court will assume sole responsibility for drawing a plan. The General Assembly is directed to inform the Court immediately if prior to May 22, 1998, it becomes apparent that the two Houses of the General Assembly will be unable to agree on a plan. In that event, the Court will immediately assume responsibility for drawing an interim plan.

ORDER, CONTINUED . . .

2. Legislation revising the 1997 plan will be submitted to the Court for approval and to the United States Department of Justice for preclearance simultaneously.

3. Within three (3) business days of enactment of the new legislation, Plaintiffs will inform the Court in writing whether they will oppose the legislation or not, and, if they oppose the legislation, they will provide the basis for their objections in detail. Defendants will have three (3) business days to respond to any objections.

4. The 1998 congressional elections will be conducted under the new legislation if (1) the Court approves the new legislation, and (b) if the United States Department of Justice preclears the legislation by June 24, 1998. In the event the Department of Justice has not precleared the legislation by June 24, 1998, the Court will assume sole responsibility for an interim plan for the 1998 elections.

5. If the new enacted plan is not approved by the Court or sole responsibility to draw a plan falls to the Court, the Court will create an interim plan for the 1998 elections with a target completion date of July 1, 1998. This interim plan will also be used for the year 2000 election cycle, unless the North Carolina General Assembly enacts, in a timely manner, a new plan

ORDER, CONTINUED . . .

which is approved by the Court and precleared by the Department of Justice as appropriate.

6. The 1998 election process, whether conducted under a legislative plan or a court ordered plan, must begin no later than July 6, 1998, in order to hold the general election on November 3, 1998. The 1998 election schedule must contain the following elements:

Filing period
July 6 through July 20

Absentee balloting begins for primary
August 14

Primary
September 15

Absentee balloting begins for general election
October 2

General election
November 3

7. The North Carolina State Board of Elections is hereby ORDERED to implement the procedures necessary to comply with the above-listed 1998 election schedule.

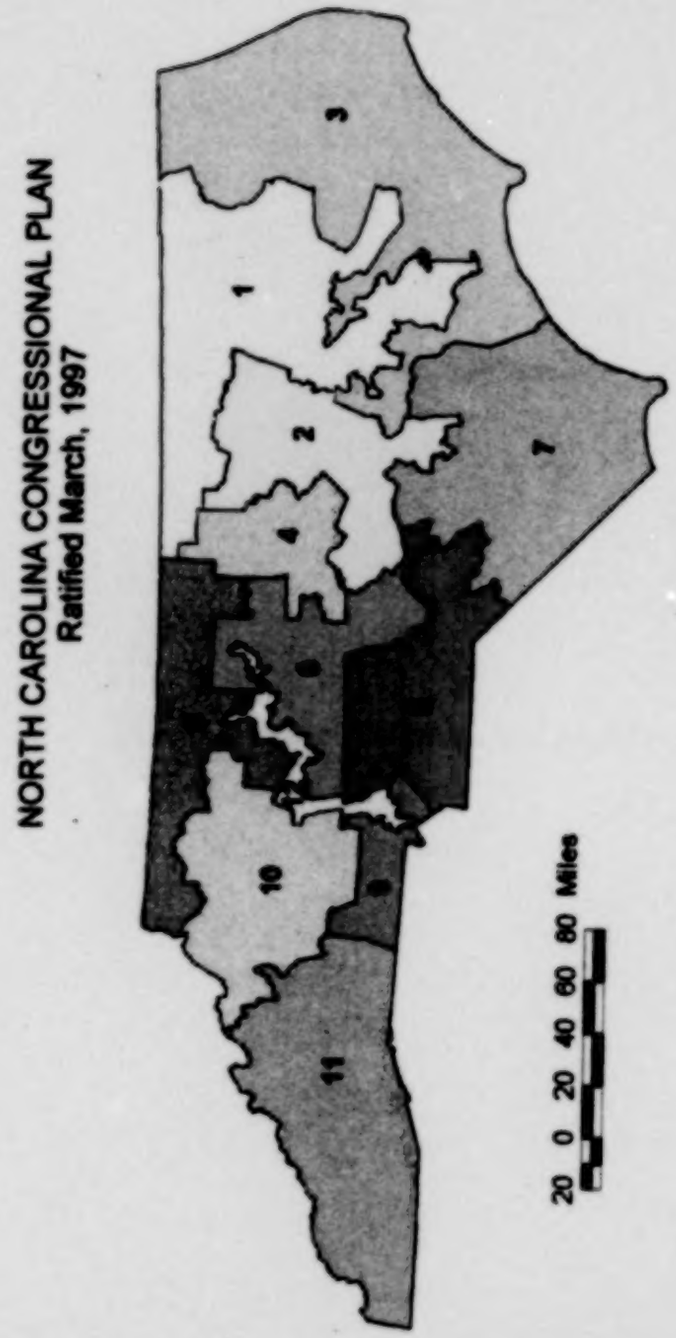
ORDER, CONTINUED . . .

SO ORDERED.

This the 20th day of April, 1998.

SAM J. ERVIN, III
United States Circuit Judge
TERRENCE W. BOYLE
Chief United States District Judge
RICHARD L. VOORHEES
United States District Judge

/s/ Terrence W. Boyle
Chief United States District Judge

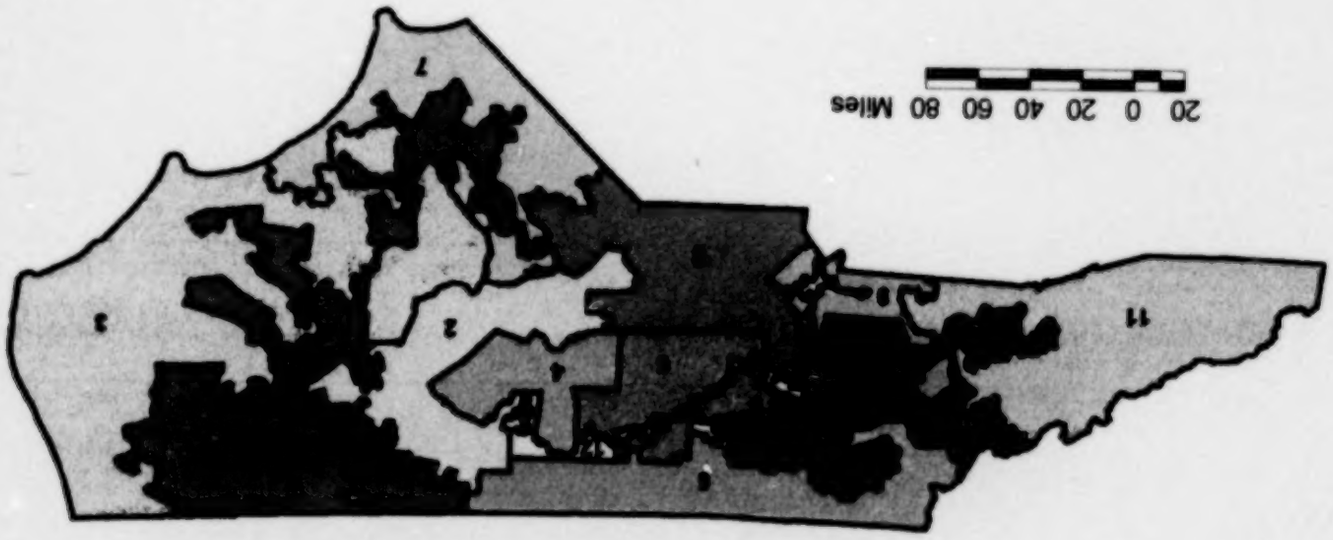




[This page intentionally left blank]

[This page intentionally left blank]

NORTH CAROLINA CONGRESSIONAL PLAN
Ratified January, 1992



[This page intentionally left blank]

[This page intentionally left blank]

¶97C-27N OF THE SECTION 5 SUBMISSION COMMENTARY, AFFIDAVIT OF GARY O. BARTLETT (CD 47)

¶97C-27N. Effect of Change on Minority Voters

The General Assembly's primary goal in redrawing the plan was to remedy the constitutional defects in the former plan. Those defects were the predominance of race in the location and shape of District 12, and perhaps in the location and shape of District 1, and a failure of narrow tailoring. This goal was accomplished by emphasizing the following factors in locating and shaping the new districts: (1) avoidance of the division of counties and precincts; (2) avoidance of long narrow corridors connecting concentrations of minority citizens; (3) geographic compactness; (4) functional compactness (grouping together citizens of like interest and needs); and (5) ease of communication among voters and their representatives. Emphasis on these factors accomplished this goal. For example: (1) the unconstitutional plan divided 44 counties while the new plan divides only 22 counties; (2) the unconstitutional plan divided 6 counties among 3 districts while the new plan does not divide any county among 3 districts; (3) the unconstitutional plan divided 80 precincts while the new plan only divides 2 precincts; (4) the unconstitutional plan used "cross-overs," "double cross-overs" and "points of contiguity" to create contiguous districts while the new plan uses none of these devices; (5) District 12 in the unconstitutional plan was 191 miles long (in "traveling distance") while District 12 in the new plan is only 102 miles long; and (6) District 1 in the unconstitutional plan was 225 miles long while District 1 in the new plan is only 171 miles long. In addition, the new plan makes new District 12 a highly urban district by joining together citizens in the City of

¶97C-27N OF THE § 5 SUBMISSION COMMENTARY, CONTINUED . . .

Charlotte and the cities of the Piedmont Triad (Greensboro, Winston-Salem and High Point). Conversely, new District 1 is a distinctively rural district formed from the largely agrarian and economically depressed northeastern counties.

The General Assembly's other primary goal was to preserve the 6-6 partisan balance in the State's current congressional delegation. This balance reflects the existing balance between Democrats and Republicans in the State. The State House of Representatives is presently controlled by Republicans; the State Senate is presently controlled by Democrats; and most statewide elections are decided by narrow margins. It was clear from the beginning that the only plan the Senate and House would be able to agree on was one that preserved the existing 6-6 balance in the congressional delegation. At the same time, the chairmen of the Senate and House redistricting committees felt strongly that the legislature had a constitutional duty to draw a plan for the three-judge panel to review, rather than leave that task to the court. For these reasons, preservation of the existing partisan balance became a driving force in locating and shaping the districts.

These primary goals were accomplished while still providing minority voters a fair opportunity to elect representatives of their choice in at least two districts (Districts 1 and 12). Data and expert studies before the General Assembly provided a strong basis in evidence for the conclusion that the *Gingles* factors are present in the area generally encompassed by new District 1. *See* Attachment 97C-28F-3B and 97C-28F-3B Ex. Based on this evidence,

¶97C-27N OF THE § 5 SUBMISSION COMMENTARY, CONTINUED . . .

legislative leaders concluded that avoidance of potential liability under Section 2 of the Voting Rights Act probably required the creation of a majority-minority district in that area. Accordingly, 50.27% of the total population within the District is African-American and 46.54% of the voting age population projections indicate that the percentage of African-American, based on 1990 census data. In addition, 1997 population projections indicate that the percentage of African-Americans and the percentage of African-American registered to vote are slightly higher in District 1 today than in 1990. *See* Attachment 97C-28A-2. These percentages plus the "cross-over" voters within the District (20 to 25%) provide African-American citizens in District 1 a reasonable opportunity to elect a candidate of their choice. This opportunity is almost certainly enhanced for the life of this plan (the 1998 and 2000 elections) by the incumbency of Eva Clayton. Congresswoman Clayton was elected from old District 1 in 1992, 1994 and 1996 with percentages of 67.0% and 61.0% and 65.9%, respectively, even though African-Americans constituted only 53% of the District's voting age population and 50.5% of the District's registered voters.

The General Assembly did not have sufficient evidence to conclude, and believes that sufficient evidence does not exist to conclude, that *Gingles* factors exist in any other area of the State so as likely to require the creation of a second majority-minority district. In *Shaw* the Supreme Court specifically rejected the State's argument that it had a compelling interest in creating a majority-minority district in the area encompassed by old District 12. Likewise, the General Assembly

¶97C-27N OF THE § 5 SUBMISSION COMMENTARY, CONTINUED . . .

specifically rejected the creation of a second majority-minority district in the area eastward of Charlotte to Cumberland and Robeson Counties, as proposed for example by Senator Cochrane. Creation of any district in that area would artificially group together citizens with disparate and diverging economic, social and cultural interests and needs. It would sandwich rural voters between urban voters in the State's banking and commercial center at one end of the district and voters residing on and around Fort Bragg and Pope Air Force Base at the other end of the district. Such a district would also rely on uncertain coalitions between African-American and Native-American voters for its "majority-minority" status. Significantly, it would have thwarted the goal of maintaining partisan balance. Under these circumstances, voters could not obtain effective representation, or be effectively represented. Moreover, under these circumstances, race would have become the predominate factor, to the exclusion of the State's redistricting criteria, in the creation of a district which would bear an uncomfortable resemblance to Georgia's District 11 declared unconstitutional in *Miller v. Johnson*.

Nevertheless, District 12 in the State's plan also provides the candidate of choice of African-American citizens a fair opportunity to win election. Though not a majority-minority district, the candidate of choice of the minority community withing the District will have a fair and reasonable opportunity to win election based on a combination of minority and non-minority votes. Congressman Mel Watt was elected from old District 12 in 1992, 1994 and 1996 with percentages of 70.4%, 65.8% and 71.5%, respectively. (African-American

¶97C-27N OF THE § 5 SUBMISSION COMMENTARY, CONTINUED . . .

citizens constituted 53% of the voting age population and 53.5% of the registered voters of old District 12) Consistent with the General Assembly's primary goal to preserve the existing partisan balance in Congress, new District 12 contains a substantial portion of the core of the urban population of old District 12 and a substantial percentage of voters with an affinity for Democrat candidates, regardless of their race. Those factors, together with the significant African-American population in the District (46.67% total population and 43.36% voting age population) provide a fair opportunity for incumbent Congressman Watt to win election.

[This page intentionally left blank]

AFFIDAVIT OF SENATOR ROY A. COOPER, III (WITHOUT ATTACHMENTS) (CD 47)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
EASTERN DIVISION
Civil Action No. 4-96-CV-104-BO(3)

MARTIN CROMARTIE, THOMAS CHANDLER MUSE, and GLENNES DODGE WEEKS,
Plaintiffs,

v.

JAMES B. HUNT, JR., in his official capacity as Governor of the State of North Carolina, et al.,
Defendants.

AFFIDAVIT OF ROY A. COOPER, III

Roy A. Cooper, III, being first duly sworn deposes and says:

1. I am a native of Nash County, North Carolina. After receiving my undergraduate and law degrees from the University of North Carolina at Chapel Hill, I returned home to

AFFIDAVIT OF SENATOR COOPER, CONTINUED . . .

Nash County where I have practiced law since 1982. A copy of my resume is attached to this affidavit.

2. In 1986, 1988 and 1990, I was elected to the North Carolina House of Representatives and in 1992, 1994 and 1996, I was elected to the North Carolina Senate. During the 1996 Session of the General Assembly, I served as Chairman of the Senate Judiciary Committee and the Senate Select Committee on Congressional Redistricting. I had not previously served on any redistricting committee.

3. My responsibility as Chairman of the Senate Redistricting Committee was to attempt to develop a new congressional plan that would cure the constitutional defects in the prior plan, and that would have the support of a majority of the members of the Senate, which was controlled by the Democrats, and the support of a majority of the members of the House, which was controlled by the Republicans. Under an order entered by the three-judge court in *Shaw v. Hunt,* the new plan had to be completed by March 31, 1997, to avoid the federal court imposing a plan on the State. The Senate's efforts to meet this responsibility are recorded in the transcripts of the meetings of the Senate Committee and of the debates on the floor of the Senate. A true and accurate copy of these transcripts is included in the North Carolina Section 5 Submission, 1997 Congressional Redistricting Plan (filed with the Affidavit of Gary O. Bartlett) as Attachments 97C-28F-4D(1)-(4).

4. Representative W. Edwin McMahan was appointed Chairman of the House Redistricting Committee by Speaker Brubaker. His responsibilities were essentially identical to mine.

5. Many people doubted that the General Assembly would be able to achieve a compromise between the Democratic controlled Senate and Republican controlled House. Redistricting generally is a task which becomes extremely partisan. Working with the leadership of the Senate and the House, however, Representative McMahan and I early on identified a single path by which a compromise might be reached and a new plan adopted. This path was to craft a plan which would cure the defects in the old plan and at the same time preserve the existing partisan balance in the State's congressional delegation. The Senate Redistricting Committee made the first attempt to travel down this path.

6. On February 20, 1997, after consultation with other Senate members, I presented a proposed plan, entitled Congressional Plan A (hereinafter Plan A), to the Senate Redistricting Committee. This plan was similar to alternative plans later proposed by the House Redistricting Committee and Representative McMahan and to the plan ultimately enacted by the General Assembly. Because Plan A turned out to be the prototype for the enacted plan, I will describe the goals the Senate leadership and I wanted to achieve in designing this plan. In addition, I will describe the process used to draw the

districts in Plan A to achieve those goals. Particular attention will be given to Districts 1 and 12.

7. We had two goals for the plan as a whole. The first goal was to cure the constitutional defects in the prior plan by assuring that race was not the predominate factor in constructing any district in the plan and to assure that traditional redistricting criteria were not subordinated to race. To accomplish this first goal, emphasis was placed on the following factors in constructing the plan: (1) avoidance of division of precincts; (2) avoidance of the division of counties when reasonably possible; (3) functional compactness (grouping together citizens of like interests and needs); (4) avoidance of long narrow corridors connecting concentrations of minority citizens; and (5) ease of communication among voters and their representatives. A comparison of the unconstitutional 1992 plan and Plan A demonstrates that this goal was accomplished. For example: (1) the unconstitutional plan divided 80 precincts while Plan A divided only 2 precincts (both of which were divided only to accommodate peculiar local circumstances); (2) the unconstitutional plan divided 44 counties while Plan A divided only 22; (3) the unconstitutional plan divided 7 counties among 3 districts while Plan A did not divide any county among 3 districts; (4) the unconstitutional plan used "cross-overs," "double cross-overs" and "points of contiguity" to create contiguous districts while Plan A used none of these devices.

8. Our second goal, and the goal that made it possible for the General Assembly to agree upon and enact a new plan, was to maintain the existing partisan balance in the State's congressional delegation, 6 Republicans and 6 Democrats. Based on my discussions with Senate leaders and with Representative McMahan, I knew that any plan which gave an advantage to Democrats faced certain defeat in the House while any plan which gave an advantage to Republicans faced certain defeat in the Senate. Preserving the existing partisan balance, therefore, was the only means by which the General Assembly could enact a plan as required by the Court. To achieve this pivotal goal, we designed Plan A to preserve the partisan core of the existing districts to the extent reasonably possible and to avoid pitting incumbents against each other. One tool I used to measure the partisan nature of districts was election results gathered and analyzed by the National Committee for an Effective Congress (NCEC). The NCEC information was based on the results of a series of elections from 1990 to 1996. I also used older election results contained in the legislative computer data base. In the end, these election results were the principal factor which determined the location and configuration of all districts in Plan A so that a partisan balance which could pass the General Assembly could be achieved.

9. The two goals we applied in drawing the plan as a whole were also applied in drawing Districts 1 and 12. To assure that race did not predominate over traditional

redistricting criteria, District 12 was drawn so that (1) only 1 precinct was divided (a precinct in Mecklenburg County that was divided in every local districting plan); (2) its length was reduced by 46% (from approximately 191 miles to 102 miles) so that it became the third shortest district in the state; (3) the number of counties included in the district was reduced from 10 to 6; (4) all "cross-overs," "double cross-overs" and "points of contiguity" were eliminated; and (5) it was a functionally compact, highly urban district joining together citizens in Charlotte and the cities of the Piedmont Urban Triad. To assure that race did not predominate over traditional redistricting criteria, District 1 was drawn so that (1) no precincts were split; (2) the number of counties included in the district was reduced from 28 to 20; (3) the number of divided counties included in the district was reduced from 18 to 10; (4) all "cross-overs," "double cross-overs" and "points of contiguity" were eliminated; (5) the length of the district was reduced by 24% (from approximately 225 miles to 171 miles); and (6) it was a functionally compact district joining together citizens in most of the rural and economically depressed counties in the northern and central Coastal Plain region of the State.

10. Maintaining Districts 1 and 12 as Democratic leaning districts was critical to achieving the pivotal goal of protecting the partisan balance in the State's congressional plan. Achieving this goal for Districts 1 and 12, however, presented special problems. First, the House insisted that

District 1 had to be drawn in a manner that protected Congressman Jones in District 3 and that avoided placing Congressman Jones' residence inside the boundaries of District 1. Second, District 12 had to be drawn in a manner that avoided placing Congressman Burr's and Coble's residences inside the boundaries of District 12. Third, District 12 had to be drawn in a manner that would not include Cabarrus County, Congressman Hefner's home county. Fourth, significant portions of Congressman Watt's and Congresswoman Clayton's former districts had been eliminated because of the directive in *Shaw v. Hunt*, thus lessening their strength as incumbents. Finally, we were concerned that Congressman Watt might lose some votes because of his race and that Congresswoman Clayton almost certainly would lose votes because of her race. To help protect District 1 as a Democratic leaning district, we included the heavy concentrations of Democratic voters in the cities of Rocky Mount, Greenville, Goldsboro, Wilson and Kinston, and to help protect District 12 as a Democratic leaning district, we included the heavy concentrations of Democratic voters in Charlotte, Greensboro and Winston-Salem in the district.

11. In developing Congressional Plan A, I also became convinced from expert studies before the General Assembly and my own knowledge and experience that Section 2 of the Voting Rights Act likely required the creation of a majority-minority district in the central to northern part of the Coastal Plain, where the largest concentration of black citizens

reside. *See* the attached map entitled, North Carolina Counties by Percent of Population Black, which illustrates the correlation between the boundaries of District 1 and this concentration of black citizens. That belief was balanced with my primary goals of curing the defects in our prior plan and protecting the existing partisan balance in the Congressional delegation in locating and drawing District 1 in Congressional Plan A.

12. On February 20, 1997, I presented Congressional Plan A to the Senate Redistricting Committee and on February 25, 1997, Representative McMahan presented his first plan, Congressional Plan A.1, to the House Redistricting Committee. Congressional Plan A and A.1 were similar. Based on NCEC election results, however, I was concerned that Representative McMahan's plan unnecessarily diminished Democratic performance in Districts 2, 8 and 12, Congressmen Hefner's, Etheridge's and Watt's districts.

13. Over the next several weeks, Representative McMahan and I were able to resolve my concerns and the concerns of the Senate leadership by negotiation. The compromise we reached finally was reflected in a plan entitled "97 House/Senate Plan." This is the plan that was enacted by the General Assembly on March 31, 1997. The first plan, "Congressional Plan A," and "97 House/Senate Plan," the enacted plan, are very similar. One of the differences is that the

first plan had 24 divided counties while the enacted plan reduced the number of divided counties to 22.

14. The "97 House/Senate Plan" is a negotiated bipartisan plan which contains districts located and shaped in a manner to avoid constitutional problems and to protect the existing partisan balance in the State's Congressional delegation. Racial fairness was, of course, considered in the development of the plan. Our obligations to represent all of our constituents of all races and to comply with the Voting Rights Act demanded that racial fairness be considered. The plan enacted is racially fair, but race for the sake of race was not the dominate or controlling factor in the development or enactment of the plan. In drawing initially Congressional Plan A and in negotiating the eventually enacted plan, partisan election data, not race, was the predominant basis for assigning precincts to districts including precincts in Districts 1 and 12. That a large proportion of precincts assigned to District 12 have significant black populations is simply the result of a strong Democratic voting pattern among blacks. Moreover, District 12 is not even composed of a majority of black citizens; it is a district in which white citizens constitute 52% of the district's total population, 55% of the districts' voting age population and 54% of the districts' registered voters. Simply, District 12 is a Democratic island in a largely Republican sea.

This the 25th day of February, 1998.

/s/ Roy A. Cooper, III

Sworn to and subscribed before me this
25th day of February, 1998.

/s/ Beverly Adams
Notary Public

My commission expires: 1/24/2000

AFFIDAVIT OF REPRESENTATIVE W. EDWIN MCMAHAN (WITHOUT ATTACHMENT) (CD 47)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
EASTERN DIVISION
Civil Action No. 4-96-CV-104-BO(3)

MARTIN CROMARTIE, THOMAS CHANDLER MUSE, and GLENNES DODGE WEEKS,
Plaintiffs,

v.

JAMES B. HUNT, JR., in his official capacity as Governor of the State of North Carolina, et al.,
Defendants.

AFFIDAVIT OF W. EDWIN MCMAHAN

W. Edwin McMahan, being first duly sworn, deposes and says:

1. I am a native of Buncombe County, North Carolina and have resided in Charlotte, North Carolina since 1974. A copy of my resume is attached.

AFFIDAVIT OF REPRESENTATIVE MCMAHAN, CONTINUED . . .

2. In 1994 and 1996, I was elected to the North Carolina House of Representatives. During the 1997 Session of the General Assembly, Harold J. Brubaker, Speaker of the House, appointed me to serve as Chairman of the House Congressional Redistricting Committee. I had no previous involvement in congressional redistricting.

3. My responsibility as Chairman of the House Redistricting Committee was to attempt to develop a new congressional plan that would cure the constitutional defects in the prior plan, and that would have the support of a majority of the members of the Senate, which was controlled by the Democrats, and the support of a majority of the members of the House, which was controlled by the Republicans. Under an order entered by the three-judge court in *Shaw v. Hunt*, that task had to be completed by March 31, 1997, to avoid the federal court imposing a plan on the State.

4. Senator Roy A. Cooper, III, was appointed Chairman of the Senate Redistricting Committee by President Pro Tem Marc Basnight. His responsibilities were essentially identical to mine.

5. Many people doubted that the General Assembly would be able to achieve a compromise between the Democratic controlled Senate and Republican controlled House on the most partisan legislative task, redistricting. Working

with the leadership of the Senate and the House respectively, however, Senator Cooper and I early on identified a single path by which a compromise might be reached and a new plan adopted. This path was to craft a plan which would cure the defects in the old plan and at the same time preserve the existing partisan balance (6 Republicans and 6 Democrats) in the State's congressional delegation.

6. To cure the constitutional defects in the prior plan, we had to be sure that traditional redistricting criteria were not subordinated to race. To achieve this goal, the leadership of the House and I wanted to avoid splitting any precincts, to avoid splitting counties when reasonably possible, to eliminate all of the "cross-overs," "double cross-overs" and "points of contiguity" from the prior plans, to facilitate communication among voters in a district and their representatives in Congress, and to place citizens with similar needs and interests in the same districts to the extent reasonably possible.

7. To protect the existing partisan balance, the leadership of the House and I recognized that we would need to protect incumbents and to preserve the cores of the prior districts to the extent consistent with our goal of curing the defects in the prior plans. The means I used to check on the partisan nature of proposed new districts was the election results in the General Assembly's computer data base (the 1990

Helms-Gantt election and the 1988 elections for Lieutenant Governor and one of the Court of Appeals seats). I also used more recent election results to evaluate the proposed Districts 2 and 4 -- the districts that we felt were the most competitive from a partisan viewpoint.

8. On February 20, 1997, Senator Cooper presented Congressional Plan A to the Senate Redistricting Committee and on February 25, 1997, I presented Congressional Plan A.1, to the House Redistricting Committee. Congressional Plan A and A.1 were similar.

9. Over the next several weeks Senator Cooper and I were able to resolve the few differences between the two plans. The compromise we finally reached is reflected in a plan entitled "97 House/Senate Plan A." This is the plan that was enacted by the General Assembly on March 31, 1997. It achieves the goals the leadership of the House and I had. It cures the constitutional defects in the prior plan and it protects the existing partisan balance in the State's Congressional delegation. The plan also meets one-person, one-vote requirements and, with regard to District 1, meets Voting Act requirements.

10. 97 House/Senate Plan A is not an unconstitutional racial gerrymander. 97 House/Senate Plan A is a negotiated bipartisan plan which contains districts located

and shaped in a manner to avoid constitutional problems and to protect the existing partisan balance in the State's Congressional delegation. Racial fairness was, of course, considered in the development of the plan. Our obligations to represent all of our constituents of all races and to comply with the Voting Rights Act demanded that racial fairness be considered. The plan enacted is racially fair, but race for the sake of race was not the dominate or controlling factor in the development or enactment of the plan. The dominate and controlling factors in developing the plan were (1) curing the constitutional defects in the prior plan and (2) protecting the existing partisan balance. Two indications that race was not dominate in drawing the plan are the fact that 12 of the 17 members of the House who are black voted against 97 House/Senate Plan A and the fact that two black members of the House, Representatives Fitch and Michaux, have claimed that the plan we enacted is not racially fair to blacks.

11. The efforts by the House of Representatives to meet their responsibilities in enacting a new congressional redistricting plan are recorded in the transcripts of the meetings of the House Redistricting Committee and the debate on the floor of the House. A true copy of these transcripts is included in the North Carolina Section 5 Submission, 1997 Congressional Redistricting Plan (filed with the Affidavit of Gary O. Bartlett) as Attachments 97C-28F-4E(1) through 97C-28F-4F(1).

This the 26th day of February, 1998.

/s/ W. Edwin McMahan

Sworn to and subscribed before me this
26th day of February, 1998.

/s/ Frances S. Carraway
Notary Public

My commission expires: 12/20/99

AFFIDAVIT OF DAVID W. PETERSON, PHD (WITHOUT ATTACHMENT) (CD 47)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
EASTERN DIVISION
Civil Action No. 04-CV-104-BO(3)

MARTIN CROMARTIE, et al.	)
	)
v.	)
	)
JAMES B. HUNT, JR. in his capacity as Governor, et al.	)

AFFIDAVIT OF DAVID W. PETERSON, PHD

DAVID W. PETERSON, PHD, being duly sworn, deposes and declares the following:

Identity

1. I am president of PRI Associates, Incorporated, a company whose chief activity is providing statistical litigation support. I am also recently retired as Adjunct Professor in the Institute of Statistics and Decision Sciences at Duke University, Durham, North Carolina, where for more than twenty years I taught courses in the theory and application of statistics. I am co-author of a book entitled *Use of Statistics in Equal*

AFFIDAVIT OF DR. PETERSON, CONTINUED . . .

Employment Opportunity Litigation, the guest editor of a special issue of the journal *Law and Contemporary Problems* devoted to statistical inference in litigation, and the contributor of a chapter to each of two other books on the use of statistics in litigation. I have testified as an expert statistical witness in more than thirty cases in federal district courts around the nation, including the Eastern District of North Carolina, and worked with legal teams as a statistical expert in more than two hundred different cases. I have testified for and advised defendants as well as plaintiffs.

Assignment

2. I am retained in this matter by the defendant to examine the statistical relationship between the boundary of North Carolina's Twelfth Congressional District as created by the North Carolina General Assembly on March 31, 1997 and the racial and political makeup of the residents in that District and the surrounding area. In particular, I am asked to determine the extent to which political affiliation might explain as well as, or better than, race the boundary of District Twelve. Most particularly, I am asked to determine whether, based on the statistical pattern of association relating the boundary of the Twelfth District and the racial and political makeup of nearby residents, race appears to have been the predominant factor in defining that boundary.

Conclusions

3. Based on an examination of the data available to me, I conclude that

a. There is a substantial correlation between the path taken by the boundary of the Twelfth district and the political preferences of the residents of the precincts touching that boundary, the tendency being to include precincts within the District which have relatively high Democratic party representation.

b. There is also a substantial correlation between the path taken by the boundary of the Twelfth District and the racial composition of the residents of the precincts touching that boundary, the tendency being to include precincts within the District which have relatively high black representation.

c. Because the correlation found in a. is as large or larger than that found in b., it follows that the path taken by the boundary of the Twelfth District can be attributed to political considerations with at least as much statistical certainty as it can be attributed to racial considerations. In other words, there is no statistical indication that race was the predominant factor determining the border of the Twelfth District; there is at least one other explanation that fits the data as well as or better than race, and that explanation is political identification.

d. There is a substantial correlation, precinct by precinct, between the fraction of a precinct's residents who are black and the fraction who favor the Democratic political party over the Republican.

e. Among the few border precincts where the above correlation does not exist, the boundary of the Twelfth District appears to have been drawn at least as much with the purpose of creating a Democratic majority within the District as with creating a black majority.

f. I also determined that blacks constitute less than half of the residents of District Twelve, and that people who identify more strongly with the Democratic Party than the Republican Party constitute more than half the residents of that District. This lends further credence to conclusions c. and e., above.

Underlying Data

4. The information on which my conclusions rest consists primarily of the computerized data base used by the North Carolina Legislature to draw the boundaries of districts under challenge in this lawsuit. This file permitted me to determine, precinct by precinct,

a. the number of residents therein by racial category, according to the 1990 US census,

b. the number of voting age residents therein by racial category, according to the 1990 US census,

c. the number of registered voters therein, by racial category, according to local voter registration records,

d. the number of people who voted for each major candidate in the 1988 Court of Appeals election,

e. the number of people who voted for each major candidate in the 1988 Lieutenant Governor election,

f. the number of people who voted for each major candidate in the 1990 Helms - Gantt US Senatorial election, and

g. the number of registered voters by political affiliation.[1]

I also relied on numerous maps of North Carolina supplied to me by the State, showing the boundaries of the Districts and the identities of the precincts bordering them.

---

[1] In 69 of the State's 100 counties, these counts can be inferred for each precinct within the county. For the remaining 31 counties, precinct level information is not available so we used Minor Civil Divisions instead. Of the nine counties touching or included in the Twelfth District, only Davie County is among the 31 counties not having precinct level information.

Analysis: Correlation of Race with Party Affiliation

5. Using the data file described above, I calculated for each of the North Carolina precincts the following seven percentages:

a. the percentage of the resident population who are black,[2]

b. the percentage of the voting age population who are black,

c. the percentage of the registered voters who are black,

d. the percentage of the voters who voted for the Democratic candidate in the 1988 Court of Appeals election,

e. the percentage of the voters who voted for the Democratic candidate in the 1988 Lieutenant Governor election,

---

[2] Nearly all of the racial minority people living in the vicinity of the Twelfth District are black. I have repeated all of the analyses described in this affidavit using all minorities in lieu of blacks, and the results are identical in all material respects.

f. the percentage of the voters who voted for the Democratic candidate in the 1990 Helms - Gantt US Senate election, and

g. the percentage of the voters who are registered as Democrats.[3]

6. I then plotted each of the State's 2217 precincts on a graph, based on its registered voter black percentage (5c above) and its registered voter Democratic percentage (5g above). The result is Chart 1. This chart, which looks like an inverted tornado, displays a strong correlation between racial composition and party preference. It shows that in precincts with high black representation, there is a correspondingly high tendency for voters to favor the Democratic Party. In precincts with low black representation, there is much more variation in party preference, and the fraction of registered voters favoring Democrats is substantially lower.

7. Virtually the same picture emerges when one includes in Chart 1 just the six counties through which District Twelve runs; and the picture is again much the same when one

[3] In calculating each of these four party affiliation percentages, I included only people who were identified with one of the two major parties. Hence, a precinct that by one of these measures is "42% Democratic," it is in the same sense "58% Republican."

includes just the nine counties touched by the Twelfth District.[4] This collection of charts is the basis for my conclusion that there is a substantial correlation between the black representation within a precinct and the proportion of its residents who favor the Democratic Party.

Analysis: Correlation of Boundary with Race and Political Party

8. The basic geographic unit used by the legislature in constructing districts is the precinct. (There are some instances in which county boundaries are used, but even these are also precinct boundaries.) To examine the correlation of the Twelfth District boundary with the race of people living along its path, I identified each of the precincts that touch the boundary, and divided the boundary into segments each of which separates one precinct inside the District from the one just outside. There are 234 such segments, each of which reflects a decision made by the legislature about the path taken by the Twelfth District border.[5] For each segment, I then determined whether the representation of blacks is greater in

[4] I have created analogous charts using the other measures of racial composition and party affiliation defined in paragraph 5, and they too do not differ materially from Chart 1.

[5] Among the border precincts, three have no registered voters. These precincts touch five boundary segments, which are necessarily excluded from correlation calculations based on measures 5c through 5g.

the inside precinct than it is in the outside precinct, using each of the three measures 5a, 5b and 5c.

9. If, for each segment, the representation of blacks were greater in the inside precinct than the outside precinct, then the correlation between the path taken by the border and the racial makeup of the precincts around which it travels would be perfect. On the other hand, were only half of the segments of this type, there would be no correlation at all between the path taken by the border and the racial composition of the precincts it separates.[6] The actual results fall about halfway between these extremes, as follows:

Black Population (5a)	79.1%
Black Voting Age Population (5b)	79.9%
Black Registered Voters (5c)	79.5%

10. It is evident from these figures that there is some positive correlation between the path taken by the border of the Twelfth District and the racial composition of the local residents. It is also clear that the correlation is not perfect.

---

[6] If none (0%) of the segments had this property, there would once again be perfect correlation between the boundary line and the racial makeup along its path, but in the sense that the boundary tends to exclude blacks from the Twelfth District.

11. Similarly, I noted for each of the 234 segments constituting the border of the Twelfth District whether the representation of Democrats was greater in the inside precinct than in the outside precinct. If 100% of the segments had this property, the border would correlate perfectly with party preference, while if only half had the property, there would be no correlation at all. The actual results, for each of the four party preference measures, are midway between these extremes, as follows:

1988 Court of Appeals Election (5d)	80.8%
1988 Lt Governor Election (5e)	78.6%
1990 Helms - Gantt Election (5f)	80.8%
Registered Voters (5g)	84.3%

12. Evidently, there is some positive correlation between the path taken by the border of the Twelfth District and the party preferences of the local residents, though the correlation is not perfect.

13. Comparing the numerical results from paragraphs 9 and 11 above, it is apparent that there is at least as much correlation between the border of the Twelfth District and the party preferences of the local residents as there is between the border and the racial composition of those residents. That is, the statistical evidence supporting party affiliation as an important determinant of the boundary is at least as strong, and marginally stronger, than the statistical evidence supporting

race as an important determinant of the boundary of the Twelfth District.

Analysis: Divergent Boundary Segments

14. As might be expected from the correlation (paragraphs 6 and 7 above) between party affiliation and racial composition within precincts, there are many District Twelve border segments in which not only is the representation of blacks higher in the inside precinct than in the outside, so too is the representation of people favoring the Democratic Party. Such segments (which I call "convergent") support equally the proposition that

a. the motivation for the District Twelve boundary was at least in part to maximize black representation within the District (the "Race Hypothesis"),

and the proposition that

b. the motivation was at least in part the maximization of Democratic Party affiliation (the "Political Hypothesis").

Clearly, convergent segments do not help us determine which of these two propositions is more likely.

15. There is a second type of convergent segment, namely a border segment for which the representation of blacks is greater in the outside precinct than in the inside and for which the representation of Democrats is also greater outside than inside. For the same reason noted above, this type of convergent segment also tells us nothing about which of the two aforementioned propositions is the more likely.

16. Only the boundary segments which are divergent, *i.e.*, those for which

a. the representation of blacks on the inside is greater than that on the outside and for which the representation of Democrats is greater on the outside than on the inside ("Type R" boundary segments),

or, alternatively, for which

b. the representation of blacks on the outside is greater and the representation of Democrats on the inside is greater ("Type P" boundary segments),

can indicate which of the above two propositions is more likely.

17. Evidently, a Type R divergent boundary segment favors the Race Hypothesis over the Political Hypothesis, while

a Type P segment favors the Political Hypothesis over the Race Hypothesis.

18. Depending on the measures used to determine racial representation and Democratic party preference, a given boundary segment may or may not be divergent. I have examined all possible combinations of the three racial measures (5a, 5b and 5c) and the four party preference measures (5d, 5e, 5f and 5g), resulting in twelve different ways to determine whether a boundary segment is divergent.

> For example, using the two measures (5c and 5g) based on registered voters, there are 41 divergent boundary segments. Of these, 26 are of Type P, namely ones for which the representation of blacks is greater on the outside than on the inside, yet the representation of Democrats is greater on the inside than on the outside. The remaining 15 divergent segments are of Type R: the representation of blacks is greater on the inside than on the outside, yet the representation of Democrats is greater on the outside. Evidently, the balance here tips in favor of the Political Hypothesis by a score of 26 divergent segments to 15: it is more likely that of the two propositions, party affiliation was the driving force rather than race.

19. Of the total of twelve such analyses,

a. seven result in a pattern of divergent boundary segments favoring the Political Hypothesis over the Race Hypothesis, in the sense just described,

b. three result in a pattern favoring the Race Hypothesis over the Political Hypothesis, and

c. two result in a pattern equally strong in support of both hypotheses.

It is clear from these analyses that the statistical support for the Political Hypothesis is at least as strong as that for the Race Hypothesis, and, indeed, somewhat stronger.

20. As indicated above, some boundary segments are divergent when judged by one pair of measures of race and party preference, but not divergent when judged by another. There are, however, ten boundary segments that are divergent by every one of the twelve combinations of race and party affiliation measures. Of these ten unequivocally divergent boundary segments,

a. six support the Political Hypothesis, while

b. four support the Race Hypothesis.

Again, the statistical support for the Political Hypothesis is at least as strong as that for the Race Hypothesis, and indeed, slightly stronger.

21. Finally, the representation of blacks in the Twelfth District by each of the three measures used herein is:

Black Population (5a)	47%
Black Voting Age Population (5b)	43%
Black Registered Voters (5c)	46%

By none of these measures do blacks constitute a majority of the people in the Twelfth District. Similarly, the representation of Democrats in the Twelfth District by each of the four measures used herein is:

1988 Court of Appeals Election (5d)	62%
1988 Lt Governor Election (5e)	62%
1990 Helms - Gantt Election (5f)	66%
Registered Voters (5g)	75%

By every one of these measures, Democrats constitute a majority of the people in the Twelfth District. These figures support the proposition that creation of a Democratic majority in District Twelve was a more important consideration in its construction than was the creation of a black majority.

Further the Affiant Saith Naught.

/s/ David W. Peterson, PhD

Subscribed and sworn to before me
this 27th day of February, 1998.

/s/ Peter R. Shalak
Notary Public

My Commission Expires: 1-16-2002

AFFIDAVIT OF DR. ALFRED W. STUART (WITHOUT ATTACHMENTS) (CD 47)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
EASTERN DIVISION

Civil Action No. 4-96-CV-104-BO(3)

MARTIN CROMARTIE, THOMAS CHANDLER MUSE, and GLENNES DODGE WEEKS,
Plaintiffs,

v.

JAMES B. HUNT, JR., in his official capacity as Governor of the State of North Carolina, et al.,
Defendants.

AFFIDAVIT OF DR. ALFRED W. STUART

Alfred W. Stuart, being first duly sworn, deposes and says:

1. I am a Professor of Geography at the University of North Carolina at Charlotte, where I have been on the faculty

AFFIDAVIT OF DR. STUART, CONTINUED . . .

since 1969. For 17 of those years I served as Chairman of the Department of Geography and Earth Sciences. I earned a BS degree from the University of South Carolina, an MS from Emory University and my PhD from Ohio State University.

2. My professional work has focused on economic and demographic change in the Charlotte urban region, North Carolina and the rest of the South. This work has found primary expression in a number of atlas-style publications. These publications were a collaborative effort with a number of colleagues in which patterns and trends have been articulated in a substantive text and illustrated with appropriate maps, charts and photographs. The atlas for the state of North Carolina was published by the University of North Carolina Press in 1975. It received wide critical acclaim and served as a model for other regional atlases that were published in Michigan, Oregon, Georgia and other states. A revision of that book is now underway and it is expected to be published by the UNC Press in 1999. Other atlas-style books which I have helped edit and author include a series on the urban regions of North Carolina and a 1989 work, *Land of the South*, that portrayed growth and change in the major sub-regions of the South. All of these books were prepared in such a way as to make the information accessible to lay readers, as a means of helping them make more informed decisions about their state and communities. A copy of my curriculum vitae is attached.

3. I was asked by representatives of the Attorney General's Office to replicate for the 1997 congressional plan an analysis I prepared in the *Shaw* litigation which compared the driving times and distances of the twelve congressional districts in the 1992 plan. My analysis is contained in this affidavit.

4. The primary means that is used by persons moving around within a congressional district in North Carolina is the personal automobile. For this reason, one of the more significant measures of intra-district interaction and information exchange is the degree of highway accessibility from one end of a district to another. For purposes of this analysis, average driving time also was computed since it is probably a greater concern for most people than mileage.

5. Access by highway is a function of both the size and shape of a district but especially of the nature of the highway network that covers it. To illustrate this point, points were selected within each district that are identifiable on a highway map and which approximate maximum distances across the district. In several cases (Districts 1, 3 and 7) where the distance appears to be about the same length in several directions, several pairs of points were selected. These pairs of points were entered into a sophisticated computer model that contained a data base of the entire highway network for North Carolina and also information on the characteristics of the roads (number of lanes, etc.) and speed limits. A TransCAD (version 2.1) software designed especially for highway studies

was used to make the analysis. The computer model chose the route or routes that represented the minimum travel time between the selected end points. It also provided the mileage of each selected route. These travel times and distances are summarized in Table 1 in the Appendix. Maps included in the Appendix outline each of the routes.

6. The travel times that were calculated by the computer program reflect average driving times in an automobile. No allowances were made for possible rush hour traffic congestion or for stopping en route. Such factors as driving at speeds other than the legal speed limits would modify the actual driving times. The point of these calculated times was not to estimate actual times but to make estimates for each route on the same basis in order to provide objective figures for comparative purposes. Small differences in times should not be taken too seriously but greater differences are meaningful.

7. The shortest travel time and distance (1.26 hours and 64 miles) for all of the 1997 congressional districts was that calculated for the relatively compact District 9, the route for which follows primarily I-85 and some of U.S. 74. In addition, Districts 4, 6 and 12 also have travel times of less than two hours and distances of less than 100 miles. In contrast, District 3, on each of two routes, has the longest paths because of the size of the district and the nature of the road network. The routes begin on the elongated Outer Banks and

go either west or south. Representative of the best highways through the district is U.S. 17, which is not an Interstate. Both routes are estimated to take over four hours and are close to or more than 200 miles long. The other longest travel times and routes are in Districts 1 and 11. The times and distances for Districts 1, 3 and 11 reflect the relative geographic size of the districts which results from the dispersion of the population in these more sparsely populated areas of the state.

8. Of all twelve congressional districts, District 12 has the third shortest travel time (1.67 hours) and third shortest distance (95 miles) between its farthest points. For purposes of intra-district interaction and information exchange, District 12 is a highly accessible district by highway and is therefore compact in the sense of travel time and distance for a congressional representative.

9. In the *Shaw* litigation, I submitted a report analyzing the time and travel distances for the districts in the 1992 congressional plan using the same computer model. The times and distances are summarized in Table 2 in the Appendix. Also included in the Appendix is a map of these routes.

10. The average travel time for the 1992 districts was 2.65 hours, ranging from a low of 1.34 hours (District 10) to a high of 4.77 hours (District 1). The average distance for the 1992 districts was 141.1 miles, ranging from a low of 57.1

miles (District 10) to a high of 271 miles (District 1). District 12, although only slightly above average for time and distance (2.97 hours and 162.4 miles) ranked in the bottom one-third for time and distance.

11. The average travel times and distances for the 1997 congressional districts do not differ significantly from the 1992 districts: the average travel time remains at 2.65 hours, while the average distance is slightly shorter at 130.6 miles. However, the travel times for District 12 have improved dramatically, moving to a number three ranking in terms of shortest time and distance.

12. At the request of the Attorney General's office, I did an analysis of the population growth in North Carolina's congressional districts. A true copy of that report is attached hereto and incorporated by reference.

This the 23rd day of February, 1998.

/s/ Alfred W. Stuart, PhD

Sworn to and subscribed before me
this 23rd day of February, 1998.

/s/ Frances S. Carraway
Notary Public
My commission expires: 12-20-99

"AN EVALUATION OF NORTH CAROLINA'S 1998 CONGRESSIONAL DISTRICT" BY PROFESSOR GERALD R. WEBSTER (WITHOUT MAPS) (CD 47)

An Evaluation of North Carolina's
1998 Congressional Districts
Professor Gerald R. Webster
Department of Geography
University of Alabama
Tuscaloosa, AL 35487-0322
Phone (205) 348-1532
Fax (205) 348-2278
GWebster@ualvm.ua.edu

I am a Professor of Geography at the University of Alabama, Tuscaloosa, Alabama, where I have been employed for the past nine years. My formal education includes a BA (1975) in political science from the University of Colorado-Denver, a MS (1980) in geography from Western Washington University, and a Ph.D. (1984) in geography from the University of Kentucky. My primary research and teaching emphases are in political geography, and range in topical focus from the local to international scales. My research has most emphasized topics in electoral geography including the issue of redistricting. I have authored over 50 publications including more than 30 in refereed journals on varied topics including redistricting. At present I am the co-editor or co-author of three forthcoming books on topics in political geography including one on redistricting to be published by Syracuse University Press. Between 1995 and 1997 I served as the Chair of the

DR. WEBSTER'S REPORT, CONTINUED . . .

Political Geography Specialty Group, Association of American Geographers, the largest organization of political geographers in the world. My Vita accompanies this report.

On December 9, 1997, I met with representatives of the North Carolina Attorney General's Office and was asked to evaluate the state's twelve congressional districts intended for use in the 1998 elections (hereafter referred to as the "1998 districts"). For this purpose I was provided maps of the 1992-1996 (hereafter referred to as the "1992 districts") and 1998 districts, and access to data from Election Data Services, one of the country's most prominent providers of data on elections and districts. From Election Data Services I secured the majority of the compactness indicators used in this report, and shape files of the congressional districts in selected states including North Carolina.

The purpose of this report is to evaluate the twelve congressional districts now in place for the 1998 elections (Figure 1). Where pertinent, these districts are compared to the 1992 districts (Figure 2). This report uses a set of traditional districting criteria on which to base its evaluation. Basic background reading on these criteria is found in the published work of Professor Richard Morrill (Department of Geography, University of Washington), and Professor Bernard Grofman (School of Social Sciences, University of California, Irvine).

Professor Morrill is a political geographer and the foremost geographic authority on districting procedures in the United States today. His 1981 monograph, *Political Redistricting and Geographic Theory*, includes a chapter entitled "Criteria for Redistricting" which is cited in this report. Professor Grofman is a political scientist and is among the most recognized authorities from that discipline on redistricting issues. Professor Grofman's "Criteria for Districting: A Social Science Perspective" published in the *UCLA Law Review* in 1985 is perhaps the most exhaustive evaluation of redistricting criteria published in the past twenty-five years, (Additional sources detailing districting criteria include Dixon 1982; Morrill 1982, 1987 and 1994; Cain 1984; Butler and Cain 1992; Grofman et al., 1992; Grofman 1993; Pildes and Niemi 1993).

REDISTRICTING CRITERIA

What follows is an evaluation of North Carolina's twelve congressional districts on the basis of the following criteria: equal population, contiguity, compactness, the integrity of local government boundaries, and continuity of representation. It should be noted at the outset that it is virtually impossible for a redistricting plan to simultaneously satisfy all criteria perfectly or completely.

In some cases, the real-world application of two criteria may contradict one another. For example, published work on the districting process suggests that the number of county

divisions should be limited where possible. But it is nearly always impossible to have no divided counties in the redistricting process due to the constitutionally-based requirement that districts have little or no difference in their populations. Thus, any county with a population above the ideal population will of necessity be divided among two or more districts. And it is frequently necessary or appropriate to divide counties with smaller populations between two or more districts to achieve compliance with the equality of population criterion or another districting goal. In short, it is indeed rare for a state not to divide some, if not many, counties. At present all southern comparison states include multiple county divisions on their congressional district maps. Twenty-six (38.8%) of Florida's 67 counties, for example, are divided between multiple congressional districts (Duncan and Lawrence 1997: 298-299).

In other cases, data limitations and real-world constraints limit the degree to which one or more criteria may be simultaneously satisfied. For example, a state with an irregular coastline will find it nearly impossible to create highly compact districts in that area of the state. A state which uses county boundaries which follow the irregular courses of rivers will find it difficult if not impossible to create highly compact districts. The pattern of population distribution can also severely limit the degree of resulting compactness. Hence, a state with an uneven population density will likely find it difficult to create highly compact districts while achieving

equality of population between districts. An evaluation of districting plans must therefore consider the existing map in light of state or local conditions, and not solely on the basis of theoretical possibilities.

Some explanation of each criterion's purpose precedes the North Carolina specific evaluation. All Tables and Figures referenced in this evaluation are found sequentially at the rear of the report following the references. An Appendix follows the referenced Tables and Figures which includes maps depicting each of North Carolina's twelve 1992 and 1998 congressional districts.

1) Equality of Population. The "equality of population" criterion stems from the U.S. Constitution and it therefore must carry substantial, if not preeminent, weight in the development of all redistricting plans. Since the 1960s the legally permissible variations between district populations have declined substantially. Concomitant improvements in technology and the detail of the data provided by the U.S. census have allowed ever-greater adherence to the principal of one-person-one-vote.

Population equality between districts may be measured by multiple indicators. The "total deviation" (also referred to as the overall range) is defined as the population difference between the smallest and largest districts (see Grofman 1985: 175, for the total deviations of districts existing in 1983, and

Rayburn and Leib 1994: 23, for the total deviations existing in 1993). The "maximum deviation" is defined as the largest absolute (+ or -) population deviation among a jurisdiction's districts relative to the optimal population (total population/number of seats) to be allocated to each district. Also pertinent is the mean or average of all district deviations from the ideal population. These measures may be expressed in terms of absolute numbers and percents.

The maximum permissible population deviation of districting plans depends on their geographic scale - whether, for example, the districts are used to elect members of the U.S. House of Representatives, a state legislature, or a city council. Due to the limits of both the census of population data and geography, maximum allowable deviations are generally greater the more local the jurisdiction being evaluated. But congressional districts are expected to have total deviations of less than 1% (Morrill 1981; Grofman 1985; Grofman et al., 1992). As determined by Rayburn and Leib (1994: 23), the districting plans in all states in 1993 were in compliance with this criterion with the largest total deviation determined for Georgia at 0.94%.

The ideal population for each congressional district in North Carolina is 552,386 (1990 state population of 6,628,637 / 12 districts = 552,386.42) (Table 1). The average absolute (+ or -) deviation of North Carolina's twelve congressional districts is 361 individuals, or 0.065% of the ideal population

to be allocated to each district. Among the districts, District 7 has the smallest deviation at a mere 4 individuals (0.001%), and District 10 the largest at 947 individuals (0.171%). District 10's deviation thus constitutes the Maximum Deviation for the state's congressional districts. The Total Deviation for the twelve districts is 0.270%.

In terms of the population equality criterion, North Carolina's present congressional districts are well within accepted guidelines. Their level of population equality is therefore evaluated favorably on this criterion. But it should be noted that 1990 census of population data is now eight years old. Based upon population projections by the North Carolina Office of State Planning, the state's 1997 population was nearly 12 percent greater than enumerated in 1990. That office further projects the next Census, to be undertaken in a little over two years, will enumerate 7.7 million North Carolinians, or 16.4 percent more individuals residing in the state than were counted in 1990. Thus, while the constitutional purpose of the census of population is to aid the reapportionment and redistricting process and the 1990 census should be used for such comparisons, malapportionment is clearly a result of using eight year old data, It is therefore true that any subsequent delineation of North Carolina's 12 congressional districts prior to the 2000 census will be hampered in achieving compliance with the preeminent criterion of the districting process, that of equal population between districts.

2) Contiguity.

There is no Constitutional obligation for congressional districts to be contiguous, though some states include such a requirement in their constitutions variously pertaining to legislative or congressional districts (Grofman 1985). The state of North Carolina does not formally stipulate that congressional districts be contiguous. A district is typically defined as contiguous if every part of the district is accessible to all other parts without traveling into a second district. This requirement has rarely generated controversy in the past. When controversy has emerged, the focus of contention has generally pertained to areas dissected by water features and whether bridge connections are sufficient to constitute contiguity (see Grofman 1985: 84).

All of North Carolina's 1998 districts are contiguous, and are thus evaluated favorably on this criterion. Second, on this criterion the present plan compares very favorably with the state's 1992 congressional districts which generated controversy pertaining to the contiguity of the 6th and 12th districts (Grofman 1993: 1261). The practical contiguity of Districts 1, 2, 5 and 10 was also substantially improved. For example, the proruption of District 2 into District 1 in Halifax County in the 1992 plan no longer exists. In the 1998 plan the mutual boundary of Districts 1 and 2 is the Halifax County-Nash County boundary. A second example pertains to the no longer existing proruption of District 5 into District 10. The

boundary between these two districts now entirely follows county boundaries.

3) The Allocation of Local Government or Electoral Units.

The non-division of local political units in their allocation to districts has traditionally been viewed as a legitimate though secondary goal of the districting process. Counties, for example, may constitute political systems in and of themselves. But it is also true that the equal population criterion carries substantially greater weight in all evaluations of districting plans than efforts to limit county subdivisions. Thus, any county which has a population above the ideal population per district will almost certainly be divided into two or more districts in a system which employs single-member districts.

At times it may be either appropriate and/or necessary to subdivide counties with lesser numbers of residents to achieve compliance with the equal population or another districting goal. For example, it may well be appropriate to divide the urban environs of a county from its dominantly rural hinterland given the widely differing circumstances oftentimes found in these two settings. Such divisions can be beneficial to the quality of representation provided to the constituents in a district because Representatives do not have to simultaneously focus their attention on both urban (e.g., mass transit and crime) and rural needs (e.g., agriculture and basic highways).

In short, it is nearly always technically impossible in any state with two or more districts for all counties to be allocated in their entirety to congressional districts and meet the goals of other criteria. And there are numerous practical reasons for dividing counties as well. Hence, county divisions are commonplace and all southeastern state comparators include multiple county divisions (Webster 1995; Duncan and Lawrence 1997).

The 1992 congressional districts in North Carolina divided 44 off [sic] the state's 100 counties (Webster 1995). The 1998 congressional districts reduce this number to 22, a 50% percent decline in the number of county divisions. This level of county divisions compares favorably with Florida, a state having undergone similar litigation, which divides 26 of its 67 counties, or nearly 40%. Thus, from the perspective of county divisions, the 1998 districts are superior to the 1992 districts on this criterion. Secondly, using Florida for the comparator, North Carolina's proportion of divided counties is judged acceptable.

The building block units used to delineate congressional districts differ between states. While some states rely on census units such as blocks or tracts, others use voting districts or precincts (Raburn and Leib 1994: 23). For the 1990 census the Bureau of the Census requested that all states participate in an effort to geographically mesh voting districts with other units of census geography. Approximately three-quarters of the

states fully participated, with the remainder participating in varying degrees. In North Carolina seventy-nine of the state's 100 counties fully participated and are subdivided by voting precincts which follow the boundaries of other units of census geography such as blocks or tracts (see Rayburn and Leib 1994).

It should be a goal of districting plans to avoid subdividing voting precincts wherever possible unless local circumstances make such divisions appropriate. If voting precincts are subdivided by congressional district boundaries, additional polling units or ballot forms may be required. Such changes can lead to voter confusion and frustration.

As of October 1, 1996, there were a total of 2,531 election precincts in the state of North Carolina. The 1992 districts divided 80 precincts. The 1998 districts reduce this number to only 2. Thus, the 1998 districts are vastly superior to the 1992 districts in their very minimal number of voter precinct divisions. Secondly, it has been conveyed by the Attorney General's Office to the author that the basis for the 2 precinct divisions pertained to local circumstances. This being true, the 1998 congressional district map must be judged very favorably in terms of its use of precincts as district building blocks.

Of the 31 counties which do not include census voter precincts, only one (Beaufort County) is not allocated to a 1998

congressional district in its entirety. This division employed township boundaries which are vastly superior to the use of census blocks or tracts which may have little significance to human patterns of interaction or governance.

4) Geographic Compactness.

Unlike the equality of population criterion, the geographic compactness criterion has no foundation in the U.S. Constitution. But it has long been viewed as a legitimate criterion for evaluating redistricting plans, and is included as a goal in approximately half of all state constitutions. The state of North Carolina is not among those states legally requiring that the members of legislative bodies be elected from compact districts (Grofman 1985). But given recent Supreme Court decisions, the compactness criterion has received renewed attention.

There is substantial legal and academic disagreement over the value of mandating districts be compact. First, requiring compact districts does not guard against the political or racial manipulation of electoral space. The geographic resolution and quality of the data now provided by the census in conjunction with the increasing sophistication of computer technology may allow compact districts to be delineated which are also directly discriminatory to a population group. Thus, highly compact districts may be intentionally detrimental to a population group (see both Morrill 1981, and Grofman 1985).

Second, in the real-world perfectly compact districts are an impossibility. Most compactness indices assume that an optimal district will be a perfect circle, the most compact of geometric shapes. But if circles were employed to subdivide the space of a jurisdiction, some of the jurisdiction's area would not be allocated to districts, but be left in the gaps between circles. Thus, circular districts are an unrealistic abstraction without direct application to real-world circumstances.

Third, the building blocks of redistricting plans, blocks, block groups, tracts, or voting precincts, are frequently delineated by streets and are oftentimes square or rectangular in shape. The shapes of these building blocks therefore largely precludes circular districts from being formed.

A fourth concern limiting real world compactness is the constitutional criterion of equality of population discussed above. It is of substantially greater legal necessity to comply with this criterion than to create perfectly compact districts. To meet this constitutional criterion map makers may be forced to create districts of less than perfect compactness. In short, evaluations of the geographic compactness of political districts must consider the constraints faced by the map maker with substantial attention focused upon local circumstances.

Compactness Indicators Used In This Report

There are a host of different geographic compactness measures available (see Niemi, et al., 1990 for a description of 24 different measures). In general these methods concentrate on a district's perimeter, areal dispersion, or population distribution in their design.

Two compactness measures are used in the present report, both of which are now among the most commonly recognized and applied by legal and academic scholars. Their elevated recognition is due largely to their calculation and application in a 1993 *Michigan Law Review* article by Richard Pildes (Professor of Law, University of Michigan) and Richard Niemi (Professor of Political Science, University of Rochester). Both authors are among the most recognized authorities on redistricting and the courts in the United States today. The purpose of their article was to measure the compactness of all congressional districts in the United States existing in 1993 in such a manner as to parallel the discussion in the Supreme Court's decision in *Shaw v. Reno* (1993). Adding to the relevance of this article and its methods was its citation in *Bush v. Vera*, 1996, as supporting evidence for the Supreme Court's findings that three congressional districts in Texas were unconstitutional.

The first measure is based on the geographic "dispersion" of a district. To calculate this measure a circle is

circumscribed around a district. The reported coefficient is the proportion of the area of the circumscribed circle which is also included in the district and ranges from 1.0 (most compact) to 0.0 (least compact).

The second measure is based upon the calculation of the "perimeter" of the district. The reported coefficient is the proportion of the area in the district relative to a circle with the same perimeter and ranges from 1.0 (most compact) to 0.0 (least compact).

Pildes and Niemi (1993: 564) provide some guidance on the evaluation of both measures. With respect to the dispersion compactness measure, they suggest "low" is equal to or less than 0.15. On the perimeter compactness measure they suggest that "low" is equal to or less than 0.05. By suggesting these guidelines they caution that "we do not imply that all districts below those points, or only those districts, are vulnerable after *Shaw*." These cutoff points are therefore best characterized as general guidelines and they should not be employed as absolute indicators of acceptable or unacceptable levels of compactness. Supporting their statement is the fact that in 1998 ten congressional districts in the U.S. are below the 0.05 benchmark on the perimeter measure (e.g., New York's 12th (0.021) and Texas' 6th (0.027)), and 13 are below the 0.15 benchmark on the dispersion measure (e.g., Florida's 22nd (0.0331) and California's 36th (0.042)).

Some Theoretical and Real World Comparisons

In addition to the compactness scores for each of North Carolina's congressional districts, additional scores were calculated for hypothetical and real-world units. The purpose for calculating these additional scores is to provide comparisons for the evaluation of the compactness coefficients for North Carolina's congressional districts. Thus, Figure 3 displays a square circumscribed by a circle. While most would visually evaluate a square district as a highly compact, the geographic dispersion score for the square is .640, and its perimeter compactness score is .785. Similarly, Figure 4 displays a rectangle circumscribed by a circle. Again, while most viewers would visually evaluate a rectangular district as substantially compact, the dispersion compactness of the rectangle is .431 and its perimeter compactness is .641.

Table 2 provides further comparisons in tabular format with selected units also presented in Figures 5-9. Among those units for which the two compactness indicators were calculated are Camden, Davie and Swain counties, the cities of Greensboro, Charlotte and Winston-Salem, and two precincts each in the cities of Greensboro, Charlotte, and Winston-Salem. These additional compactness coefficients provide instructive comparators using real-world geographic units. But it must also be underscored that these units are not directly indicative of the constraints faced by those undertaking the redistricting process. For example, counties are not required to maintain

equal populations and their initial geographic delineations were not constrained by the need to aggregate smaller units of census geography such as tracts and blocks.

With the cautionary notes above in mind, the comparators provided in Table 2 are helpful to contrast the levels of compactness magnitude of real-world political units relative to the square and rectangle examples presented above. Secondly, these more real-world examples are indicative of the contrast in magnitude of the two compactness measures for the same jurisdiction, the perimeter compactness measure generally being lower in magnitude for such units. Thus while Charlotte's dispersion compactness measure is high at .571, its perimeter compactness coefficient is much lower at 0.079. Similar contrasts in the magnitudes of the two coefficients were also found to characterize both Greensboro and Winston-Salem.

The purpose for calculating the compactness coefficients of precincts in the three cities is to demonstrate the constraints posed by the building-block units used by the State of North Carolina in delineating its congressional districts. On the dispersion compactness measure the coefficients range from a low of 0.154 to a high of 0.297 (Table 2). On the perimeter compactness measure the scores range from a low of 0.114 to a high of 0.213. These measures are significant because building-block units of relatively low compactness will

generally result in districts of lesser compactness than districts composed of highly compact building-block units.

Added Constraints Facing Map Makers Drawing Political Districts

As noted above, electoral district compactness must be evaluated with flexibly due to the greater number of constraints placed on the process of their formation. The compactness of a congressional district can be limited by a host of conditions beyond the control of the map maker. For example, many counties use meandering rivers as their boundaries. Thus a congressional district with boundaries following such county boundaries would likely have a limited degree of perimeter compactness. Secondly, simple geographic compactness indicators ignore real-world patterns of interaction, population homogeneity and travel.

Using the river example above, a geographically elongated district centered upon a riverine environment where patterns of employment and sociopolitical interaction are focused upon the river may be highly appropriate. Even more appropriate to the current situation is the focus of a district upon major transportation corridors such as freeways. As stated by Professor Morrill, the most distinguished political geographer in the United States with a long standing interest in the districting process,

> A too simplistic application of . . . geographic compactness measures is foolish, especially where the distribution of the population is uneven, perhaps strung out along roads or railroads. Travel may be easier and cheaper in some directions than in others, such that an elongated district astride a major transportation corridor might in fact be the most compact in the sense of minimum travel time for a representative to travel around the district.

This passage underscores that there are circumstances under which there are appropriate reasons for districts to be of lesser compactness. An excellent example is Florida's 22nd district (see Figure 12). It is described by Duncan and Lawrence (1997: 367) as

> a shoestring of a district hugging the south Atlantic coast from Juno Beach south to Miami Beach. It is roughly 90 miles long and in some places just a few blocks wide. Its width never extends beyond three miles.

This district reflects the reality that the beaches along central Florida's coast are peopled by comparatively wealthy families as compared to those only three or four miles from the coast. It is represented by Republican Clay Shaw, Jr., and to my knowledge has not been the target of any litigation. Its

level of perimeter compactness is 0.0467, while it has the lowest level of dispersion compactness of any congressional district in the United States at 0.0331.

A second example pertains to Illinois' 4th district which has popularly been referred to as the "earmuff district." It has also been described as "C-shaped," "distended," as having an "uncouth configuration," and as resembling a "Rorschach ink blot" (Duncan and Lawrence 1997: 454). While most assuredly contorted in its geographic design, this district was found to be constitutional by the Supreme Court on January 26, 1998 because it serves a compelling state interest. Its dispersion compactness coefficient is 0.1933, while its level of perimeter compactness is 0.0263. Its perimeter compactness score is the second lowest among congressional districts in the United States today (the lowest is New York's 12th district).

It must be stressed that legislators represent people, and the distribution of the population on the landscape is invariably uneven. Given this unevenness, and the desire to include a requisite number of people with similar social, economic or political orientations, among other competing goals, it is largely an impossibility to universally create districts of perfect theoretical compactness. Such an endeavor would be at odds with quality representation, and likely fruitless in result.

North Carolina's Congressional Districts

In 1992 the mean dispersion compactness of North Carolina's twelve congressional districts was 0.280, with the range being from a low of 0.045 for district 12 to a high of 0.440 for district 6 (Table 3). The mean level of dispersion compactness for the 1998 districts substantially increased to 0.354. While the 12th District continued to be the lowest among the state's 12 congressional districts, its dispersion compactness more than doubled to 0.109. Secondly, this level should be evaluated in light of the district's focus upon major transportation corridors including Interstates 40, 77 and 85. District 7 had the greatest level of dispersion compactness at 0.622. It should be noted that District 7's level of compactness is nearly that of the square displayed in Figure 3.

In 1992 the mean level of perimeter compactness for North Carolina's twelve districts was 0.095 (Table 3). The perimeter compactness coefficients ranged from a low of 0.014 for the 12th district to a high of 0.319 calculated for the 4th district. The mean level of perimeter compactness for the 1998 districts is a substantially increased 0.192. These coefficients ranged from a low of 0.041 for the state's 12th district to a high 0.325 for the 7th district. Again, the 12th district's level of objective geographic compactness should be evaluated in light of its focus upon major transportation corridors in the area.

Table 4 presents the absolute and percentage change in the levels of compactness on both the dispersion and perimeter measures for North Carolina's 12 congressional districts. The average district in North Carolina increased its level of dispersion compactness by 0.075 or 39.1%. The increase in the level of District 12th's dispersion compactness was greatest at 142.2%. District 6's level of dispersion compactness actually fell by nearly 18 percent. This finding underscores that changes in one district very frequently lead to changes in other districts, and the direction of such successive impacts will not necessarily be in the desired direction.

The average level of perimeter compactness for the state's 1998 districts is also well above what existed in 1992 (Table 4). The mean district's level of compactness rose 0.097 or nearly 172%. District 7's increase was the greatest at 525%. District 4's perimeter compactness fell by over 13%.

North Carolina Compared to Other States

Other states have made adjustments to their congressional districts since 1992 because of litigation similar to that experienced by North Carolina. Table 5 compares the means for both compactness indicators in 1992 and 1998 for the state's of North Carolina, Florida, Georgia and Texas. These coefficients are invaluable because they suggest the degree of change impacting all districts within each state. In short, the redrawing of a single district may impact most other

districts in a state. Thus, while North Carolina's 12th district was a principal focus of legal challenges, no district in the state was left untouched by the changes to its design.

North Carolina's mean dispersion compactness coefficient is 0.354 for the 1998 districts, higher than both Florida and Texas (Table 5). Its mean dispersion compactness rose by 0.074, or 26.4% between the 1992 and 1998 plans. This mean increase in compactness was the greatest of the four states examined.

North Carolina's mean perimeter compactness coefficient is 0.192 for the 1998 districts, higher than that for Texas (0.164) and similar to that calculated for Florida (0.207) (Table 5). In terms of absolute change, North Carolina's mean level of perimeter compactness rose from 0.095 to 0.192, or by 0.097. In terms of both absolute and percentage change, this level of increase was the greatest among the four states examined, doubling the percentage increase of second place Georgia.

Table 6 specifically compares the levels of compactness for North Carolina's 12th congressional district with other challenged districts in North Carolina, Florida, Georgia, Illinois and Texas. As can be ascertained from the Table, the increase in the 12th district's level of dispersion compactness is second only to Georgia's 11th district among those examined. While the 12th district experienced the second smallest level of

increase among the set of districts considered on the perimeter compactness measure, its increase was substantial at 192.9%.

The levels of compactness for North Carolina's twelve districts are substantially increased in the 1998 districts as compared to the 1992 districts. Thus, the system as a whole experienced a substantial increase in compactness. At present eleven of the state's twelve districts are above the benchmarks suggested by Niemi and Pildes (1993) as indicative of "low" compactness. While the 12th congressional district's level of compactness remains marginally below the suggested benchmarks, its level of increase is substantial and is comparable to that of redrawn districts in other states. Secondly, and in reference to the earlier quote by Professor Morrill, evaluations of the 12th district's geographic compactness should also consider its travel time compactness. Travel times are rarely a direct function of straight line distances. Rather the available travel modes and directness of traffic corridors between points must also be considered. Thus it is highly probable that the time needed for the 12th district's representative to travel to meet constituents at opposite ends of the district is substantially less than in many if not most other more geographically compact districts.

5) Continuity of Representation.

It is counterproductive to fundamentally alter the system of districts in a state each time new districts are

delineated. Wholesale change may lead to voter confusion and frustration, and thus non-participation. While the goal of preserving the integrity of the district system may be difficult if a state has experienced substantial population growth in the decennial districting cycle, boundary "stability helps to develop and maintain a sense of identity with districts" (Morrill 1981: 27). The goal of maximizing the continuity of representation is particularly important when changes occur in the middle of the normal decennial redistricting cycle. Thus the voters of the state of North Carolina have now experienced two significant changes to their district association in the past seven years, with a third necessarily coming for the 2002 election cycle.

It is clear that the 1998 congressional districts are significantly different from those employed in the elections of 1992, 1994, and 1996. It is also clear that effort was expended to maintain the geographic cores of the 1992 districts in the 1998 remap. Table 7 presents the proportion of each district's area in 1992 which remains in the 1998 districts. On average 76.4% of the area in each of the state's twelve districts in 1992 was preserved in the 1998 districts. This proportion ranges from a high of 96.7% for the 11th district to a low of 41.6% for the 12th district. Thus, the 12th district was more dramatically redrawn than any other district in the state. By comparison, when Florida's 3rd district was redrawn under similar circumstances, 48.4% of the area of the early 1990s district was preserved in the current district (see Figures 10 and 11).

The changes created by the redrawing of North Carolina's congressional districts also shifted one-quarter of the state's population to a different district, a very substantial movement of the population between districts even for a decennial redistricting (Table 8). The impact on individual districts ranged from a low of 7.6% of District 11's population being shifted, to a high of 40.5% for District 2's population. Districts 1, 2, 4, 5, and 12 all had more than 30% of their residents shifted to another district in the 1998 remap. Clearly, such substantial shifts from one representative to another can be unsettling for many constituents.

Attention to balancing the legal necessity for change with the interests of those represented is appropriate in all districting cycles, but most particularly for those changes in the middle of the normal decennial cycle. The changes in the 1998 districts as compared to the 1992 districts cannot be characterized as minimal. Rather I would characterize the change as moderate because attention was paid to maintaining the geographic cores of the 1992 districts (I would characterize extreme change as a plan that paid no heed to the existing geographic cores of the former districts). Thus, on this criterion I evaluate the efforts of those producing the remap favorably because of their balance in complying with the June 1996 court order while preserving a moderate level of continuity of representation for residents of the state's twelve congressional districts,

Conclusions

The purpose of this report was to examine the twelve 1998 congressional districts in the state of North Carolina from the perspective of five traditional redistricting criteria. Where appropriate the current districts were compared with those first used in the 1992 congressional elections. The findings of this report are summarized below.

1) Equal Population. The total deviation of the 1998 districts is 0.270%, well below the generally accepted guideline of less than 1.0%. Thus the present districts are evaluated positively on this criterion.

2) Contiguity. All twelve of North Carolina's 1998 districts are contiguous and are therefore evaluated positively on this criterion. Secondly, the level of practical contiguity in the 1998 districts is substantially increased over that existing in the 1992 districts, particularly as this criterion relates to the 6th and 12 districts. Thus, when considering the change between the 1992 and 1998 districts, the current plan is evaluated very favorably.

3) The Allocation of Local Government or Electoral Units. The 1998 districts reduce the number of divided counties from 44 in 1992 to 22 at present. This is a substantial reduction and the present plan is therefore evaluated favorably from this perspective. Secondly, the 1998 districts effectively

employed voting precincts as building blocks with only 2 of the 2,531 census defined precincts in the state being divided. Of the 31 counties not subdivided by census defined voting precincts, only one was divided in the districting process. In this case (Beaufort County), township boundaries were used, which are far better building blocks than census blocks or tracts.

4) Geographic Compactness. The level of compactness determined for the 1998 districts is substantially improved over that existing in the 1992 districts. At present only the 12th congressional district is marginally below the suggested guidelines for judging "low" compactness. But such judgements should also consider the rate of change for the 12th, which was found here to be very substantial and in line with the magnitude of change experienced for other districts ordered redrawn by the court system. Secondly, the 12th's level of compactness is similar to other existing districts not under challenge (e.g., Florida's 22nd, see Figure 12), and at least one district found constitutional by the Supreme Court (e.g., Illinois' 4th). Finally, Professor Morrill's 1981 argument that elongated districts which center upon transportation corridors may be highly compact in terms of travel time is pertinent.

5) Continuity of Representation. The redrawing of North Carolina's 1992 congressional districts introduced substantial change in the state's system of representation. On average, 24% of the area in the 1992 districts was allocated to

a different district on the 1998 map. Most dramatic was the impact upon the 12th congressional district - the 1998 district includes only 42% of the original area of the 1992 district. Similarly, nearly 26% of North Carolina's population was moved to a different district in the 1998 plan as compared to the 1992 map. The magnitude of this change is substantial, most particularly in a mid-decennial redrawing of the state's congressional districts. In short, those undertaking the remap appear to have sought balance between the necessity of district boundary change and the preservation of representational continuity.

References

Butler, D. and Cain, B. (1992), Congressional Redistricting: Comparative and Theoretical Perspectives, New York, NY: MacMillan.

Cain, B. (1984), The Reapportionment Puzzle, Berkeley: University of California Press.

Dixon, R. G. (1982), "Fair Criteria and Procedures for Establishing Legislative Districts," in B. Grofman, A. Lijphart, R. B. McKay, and H. A. Scarrow eds., Representation and Redistricting Issues, pp. 7-19. Lexington, Mass.: Lexington Books.

Duncan, P. D., and Lawrence, C. C. (1997), Politics in America, 1998: The 105th Congress, Washington, D.C.: Congressional Quarterly.

Grofman, B. (1985), "Criteria for Redistricting: A Social Science Perspective," UCLA Law Review, 33: 77-184.

Grofman, B. (1993), "Would Vince Lombardi Have Been Right If He Had Said, 'When It Comes to Redistricting, Race Isn't Everything, Its the Only Thing'?," Cardozo Law Review, 14: 1237-1276.

Grofman, B., Handley, L., and Niemi, R. G. (1992), Minority Representation and the Quest for Voting Equality, Cambridge, NY: Cambridge University Press.

Morrill, R. L. (1981), Political Redistricting and Geographic Theory, Washington, D.C.: Association of American Geographers.

Morrill, R. L. (1982), "Redistricting Standards and Strategies After Twenty Years," Political Geography Quarterly, 1: 361-369.

Morrill, R. L. (1987), "Redistricting, Region, and Representation," Political Geography Quarterly, 6: 241-260.

Morrill, R. L. (1994), "Electoral Geography and Gerrymandering: Space and Politics," in G. J. Demko and W. B. Wood eds., Reordering the World, pp. 101-119, Boulder, CO: Westview Press.

Niemi, R. G., Grofman, B., Carlucci, C. and Hofeller, T. (1990), "Measuring Compactness and the Role of a Compactness Standard in a Test for Partisan and Racial Gerrymandering," Journal of Politics, 52(4): 1155-1181.

Pildes, R. H. and Niemi, R. G. (1993), "Expressive Harms, "Bizarre Districts," and Voting Rights: Evaluating Election-District Appearances After *Shaw v. Reno*," Michigan Law Review, 92 (3): 483-587.

Raburn, R., and Leib, J. I. (1994). "Congressional District Building Blocks: Choice and Impact in the 1990s," Comparative State Politics, 15(2): 17-27.

Webster, G. R. (1995), "Congressional Redistricting in the Southeastern U.S. in the 1990s," Southeastern Geographer, 35(l): 1-21.

[This page intentionally left blank]

DR. WEBSTER'S REPORT, CONTINUED . . .

Table 1
Population Equality Between North Carolina
Congressional Districts Existing in 1998*

District #	Total Population	Absolute Deviation[a]	Percent Deviation[b]
1	552,161	225	-0.041%
2	552,152	234	-0.042
3	552,622	236	+0.043
4	551,842	544	-0.098
5	552,084	302	-0.055
6	552,171	215	-0.039
7	552,382	4	-0.001
8	553,143	757	+0.137
9	552,615	229	+0.041
10	553,333	947	+0.171
11	552,089	297	-0.054
12	552,043	343	-0.062
Total	6,628,637	--	--
Mean	552,386	361	0.065%

DR. WEBSTER'S REPORT, TABLE 1, CONTINUED . . .

District #	Total Population	Absolute Deviation[a]	Percent Deviation[b]
Total Deviation[c]		1,491	0.270%
Maximum Deviation[d]		947	0.171%

* Based upon the 1990 Census of Population.

a Absolute difference between district and mean of 552,386.

b Percentage difference between district and mean of 552,386.

c The total deviation is the difference between the largest (#10) and smallest (#4) district.

d The maximum deviation constitutes that district most deviating from the ideal population.

SOURCE: Calculated by author from data provided by State of North Carolina and reflecting the 1990 Census of Population.

DR. WEBSTER'S REPORT, CONTINUED . . .

Table 2
Comparator Compactness Indicators for Geographic Units in North Carolina

Geographic Unit	Dispersion Compactness	Perimeter Compactness
North Carolina*	0.268	0.382
Selected Counties:		
Camden County*	0.173	0.242
Davie County*	0.540	0.410
Swain County*	0.321	0.265
Selected Cities:		
Greensboro	0.444	0.113
Charlotte*	0.571	0.079
Winston-Salem	0.548	0.075
Precincts in Greensboro:		
Number 119	0.297	0.173
Number 139	0.289	0.207

DR. WEBSTER'S REPORT, TABLE 2, CONTINUED . . .

Geographic Unit	Dispersion Compactness	Perimeter Compactness
Precincts in Charlotte:		
Number 10X2	0.179	0.212
Number 195	0.154	0.213
Precincts in Winston-Salem:		
Number 1439	0.211	0.199
Number 1446	0.184	0.114

* Units for which there are accompanying figures.

SOURCE: Compactness measure coefficients calculated by University of Alabama Cartography Lab using U.S. Bureau of the Census TIGER Files.

DR. WEBSTER'S REPORT, CONTINUED . . .

Table 3
Compactness of North Carolina Congressional Districts
as Existing in 1992 and 1998[a]

	1992		1998	
District	Disper.[b]	Perim.[c]	Disper.[b]	Perim.[c]
1	.254	.028	.317	.107
2	.247	.061	.407	.176
3	.350	.055	.407	.129
4	.398	.319	.450	.277
5	.136	.080	.206	.130
6	.440	.092	.362	.113
7	.287	.052	.622	.325
8	.334	.166	.345	.255
9	.281	.070	.292	.193
10	.299	.061	.402	.259
11	.288	.143	.335	.306
12	.045	.014	.109	.041
Mean	.280	.095	.354	.192

DR. WEBSTER'S REPORT, TABLE 3, CONTINUED . . .

SOURCE: Compactness measures for 1992 districts were calculated by Election Data Services. Compactness measures for the 1998 districts were calculated by the University of Alabama Cartography Lab.

[a] Both the "dispersion" and "perimeter" compactness measures are discussed in Pildes and Niemi (993). This article was cited in the Supreme Court's plurality decision in *Bush v. Vera* (June, 1996) as providing substantiation for its ruling that Texas congressional districts 18, 29 and 30 were unconstitutional. The comparable indices for the three Texas districts prior to the decision were as follows: District 18: dispersion .36, perimeter .01. District 29: dispersion .19, perimeter .01. District 30: dispersion .24, perimeter .02. Perimeter measures are typically of lesser magnitude than dispersion scores. In 1993, 13% of all congressional districts had perimeter scores below .10. In 1998 9% of all districts are below .10 on the perimeter compactness measure.

[b] This measure ranges from 0.0 (least compact) to 1.0 (most compact). To calculate this measure the district is first circumscribed by a circle. The coefficient is the percentage of the area in the circumscribed circle which is also contianed in the district.

[c] This measure ranges from 0.0 (least compact) to 1.0 (most compact). To calculate this measure the perimeter of the district is first calculated. The area of a circle with this perimeter is then calculated. The reported coefficient is the proportion of the area in the district relative to the circle. The equation used is (((4 x Pi) x Area of District) / (District's Perimeter^2)).

DR. WEBSTER'S REPORT, CONTINUED . . .

Table 4
Change in Compactness of North Carolina Congressional Districts as Existing in 1992 and 1998[a]

District No.	Change in Compactness			
	Dispersion		Perimeter	
	Absolute	Percent	Absolute	Percent
1	+.063	+24.8%	+.079	+282.1%
2	+.160	+64.8%	+.115	+188.5%
3	+.057	+16.3%	+.074	+134.5%
4	+.052	+13.1%	-.042	-13.2%
5	+.070	+51.5%	+.050	+62.5%
6	-.078	-17.7%	+.021	+22.8%
7	+.335	+116.7%	+.273	+525.0%
8	+.011	+3.3%	+.089	+53.6%
9	+.011	+3.9%	+.123	+175.7%
10	+.103	+34.4%	+.198	+324.6%
11	+.047	+16.3%	+.163	+114.0%
12	+.064	+142.2%	+.027	+192.8%
Mean	+.075	+39.1%	+.097	+171.9%

DR. WEBSTER'S REPORT, TABLE 4, CONTINUED . . .

SOURCE: Calculated by author from data in Table 3.

[a] Both the "dispersion" and "perimeter" compactness measures are discussed in Pildes and Niemi (1993). See Table 3 for definitions of measures.

Table 5

Increase in North Carolina Congressional District
Compactness in Comparison to Florida, Georgia and Texas

Mean Dispersion Compactness

State	1992	1998	Absolute Change	Percent Change
North Carolina (N=12)	.280	.354	+0.074	+26.4%
Florida (N=23)	.314	.323	+0.009	+2.9%
Georgia (N=11)	.347	.400	+0.053	+15.3%
Texas (N=30)	.310	.322	+0.012	+3.9%

Mean Perimeter Compactness

State	1992	1998	Absolute Change	Percent Change
North Carolina (N=12)	.095	.192	+0.097	+102.1%
Florida (N=23)	.203	.207	+0.004	+2.0%
Georgia (N=11)	.181	.272	+0.091	+50.3%
Texas (N=30)	.131	.164	+0.033	+25.2%

SOURCE: Calculated by author.

Table 6

Increase in Congressional District Compactness of Selected[a]
Congressional Districts in North Carolina, Florida, Georgia, Illinois and Texas

State	Dispersion Compactness 1992	1998	Absolute Change	Percent Change
North Carolina				
District 1	0.254	0.317	+0.063	+24.8%
District 12	0.045	0.109	+0.064	+142.2
Florida				
District 3	0.111	0.136	+0.025	+22.5
Georgia				
District 2	0.323	0.541	+0.218	+67.5
District 11	0.169	0.444	+0.275	+162.7

State	Dispersion Compactness 1992	1998	Absolute Change	Percent Change
Illinois				
District 4	0.193	0.193	0.000	0.0
Texas				
District 18	0.356	0.335	-0.021	-5.9
District 29	0.194	0.384	+0.190	+97.9
District 30	0.243	0.383	+0.140	+57.6

DR. WEBSTER'S REPORT, TABLE 6, CONTINUED . . .

State	Perimeter Compactness 1992	1998	Absolute Change	Percent Change
North Carolina				
District 1	0.028	0.107	+0.076	+282.1%
District 12	0.014	0.041	+0.027	+192.9
Florida				
District 3	0.011	0.050	+0.039	+354.5
Georgia				
District 2	0.088	0.411	+0.323	+367.0
District 11	0.065	0.259	+0.194	+298.5
Illinois				
District 4	0.026	0.026	0.000	0.0

DR. WEBSTER'S REPORT, TABLE 6, CONTINUED . . .

State	Perimeter Compactness 1992	1998	Absolute Change	Percent Change
Texas				
District 18	0.011	0.151	+0.140	+1,272.7
District 29	0.008	0.178	+0.170	+2,125.0
District 30	0.016	0.180	+0.164	+1,025.0

SOURCE: Calculated by author.

* While North Carolina's 1st and 12th Districts were both challenged, only the 12th was ruled unconstitutional on June 13, 1996. Florida's 3rd District was ruled unconstitutional on April 17th, 1996. Georgia's 11th District was ruled unconstitutional on June 29th, 1995, and its 2nd District was found likewise on October 30, 1995. Illinois' 4th District has been the subject of nearly continuous criticism and litigation since its creation. But the district was found constitional due to a compelling state interest by the Supreme Court on January 26, 1998. Texas' 18th, 29th and 30th Districts were ruled unconstitutional on June 13th, 1996.

DR. WEBSTER'S REPORT, CONTINUED . . .

Table 7
Proportion of Area in 1992 Districts That
Remains in the 1998 Districts

District #	Percentage of 1992 Area That Remains in the 1998 Districts
1	65.3%
2	70.3%
3	75.2%
4	75.5%
5	66.3%
6	81.8%
7	88.3%
8	86.9%
9	90.0%
10	79.4%
11	96.7%
12	41.6%
Mean	76.4%

SOURCE: Calculated by the University of Alabama Cartography Laboratory.

[This page intentionally left blank]

DR. WEBSTER'S REPORT, CONTINUED . . .

Table 8
Population Shifts from 1992 Districts in the
Drawing of the 1998 Districts

District #	Number of People Shifted from 1992 District	Percentage of 1992 District Population Shifted
1	180,984	32.8%
2	223,685	40.5%
3	148,886	26.9%
4	194,395	35.2%
5	177,687	32.2%
6	143,065	25.9%
7	155,585	28.2%
8	81,410	14.7%
9	53,587	9.7%
10	118,426	21.4%
11	42,110	7.6%
12	174,471	31.6%
Total	1,694,291 (25.6% of state's pop.)	
Mean	141,191	25.6%

SOURCE: Based upon data provided by the State of North Carolina and reflecting the 1990 Census of Population.

[This page intentionally left blank]

SHAW, ET AL. V. HUNT, ET AL., CA NO. 92-202-CIV-5-BR, ORDER OF UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA, SEPTEMBER 12, 1997

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION
CIVIL ACTION NO. 92-202-CIV-5-BR

RUTH O. SHAW, *et al.*,)
Plaintiffs,)
)
JAMES ARTHUR "ART" POPE, *et al.*,)
Plaintiff-Intervenors,)
v.)
GOVERNOR JAMES B. HUNT, in his official capacity as Governor of the State of North Carolina, *et al.*,)
Defendants,)
)
RALPH GINGLES, *et al.*,)
Defendant-Intervenors.)

ORDER

For reasons given in the contemporaneously filed Memorandum Opinion, it is ORDERED

***SHAW* ORDER OF SEPTEMBER 12, 1997, CONTINUED . . .**

1. That the congressional redistricting plan (1997 N.C. Sess. Laws, Ch. 11) submitted by the state defendants to this court for review on April 1, 1997, is hereby APPROVED as having adequately remedied the specific constitutional violation respecting former congressional District 12 that was found by the Supreme Court of the United States in *Shaw v. Hunt*, 116 S. Ct. 1894 (1996);

2. That this court's injunction entered on July 30, 1996, which *inter alia*, prohibited the conduct of further congressional elections pending approval of a remedial redistricting plan is hereby DISSOLVED;

3. That the claim added by amendment to the complaint in this action on July 12, 1996, which challenged on "racial gerrymandering" grounds the creation of former congressional District 1, is hereby DISMISSED, without prejudice, as moot; and

4. Defendants' motion suggesting a schedule and process for approving the state's new congressional redistricting plan is DENIED as moot.

This 12th day of September, 1997.

For the Court: /s/ W. Earl Britt
United States District Judge

SHAW, ET AL. V. HUNT, ET AL., CA NO. 92-202-CIV-5-BR, MEMORANDUM OPINION OF UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA, SEPTEMBER 12, 1997

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION
CIVIL ACTION NO. 92-202-CIV-5-BR

RUTH O. SHAW, *et al.*,)
Plaintiffs,)
)
JAMES ARTHUR "ART" POPE, *et al.*,)
Plaintiff-Intervenors,)
)
v.)
GOVERNOR JAMES B. HUNT, in his official capacity as Governor of the State of North Carolina, *et al.*,)
Defendants,)
)
RALPH GINGLES, *et al.*,)
Defendant-Intervenors.)

MEMORANDUM OPINION

SHAW MEMORANDUM OPINION OF SEPTEMBER 12, 1997, CONTINUED . . .

PER CURIAM:

This matter is before the court upon submission by the state-defendants of a congressional redistricting plan enacted by the General Assembly of North Carolina in compliance with this court's injunctive decree of July 30, 1996. The submission seeks approval of the plan as having adequately remedied the constitutional violation found by the Supreme Court of the United States in *Shaw v. Hunt*, 116 S. Ct. 1894 (1996), and, in consequence, a dissolution of this court's injunction against the conduct of further congressional elections pending that approval.

For reasons that follow, we conclude that the plan does adequately remedy the specific constitutional violation found as to the plaintiffs and plaintiff-intervenors in this case, and on that basis we will enter an order approving the plan to that extent and dissolving the extant injunction.

I.

On June 13, 1996, the Supreme Court of the United States entered its judgment remanding this action for further proceedings by this court in conformity with the Supreme Court's decision that North Carolina's then-extant congressional redistricting plan was unconstitutional because unjustified "racial gerrymandering" in the location and

configuration of District 12 violated equal protection rights of some of the named plaintiffs in the action. *Shaw*, 116 S. Ct. at 1899.

Pending receipt of the Supreme Court's mandate which did not issue immediately, this court, on July 12, 1996, granted an unopposed motion by plaintiffs and plaintiff-intervenors to amend the complaint in the action to add new parties and to raise a *Shaw* claim challenge to District 1.

Following receipt of the Supreme Court's mandate and after holding a hearing on the implementation of the required remedy for the constitutional violation, we entered an order on July 30, 1996, that enjoined the state-defendants from conducting any congressional elections under the then existing redistricting plan after the 1996 elections, but allowed the then ongoing electoral process for those elections to proceed to completion. The order referred the development of a proposed remedial plan to the General Assembly of North Carolina for exercise of its primary jurisdiction in the matter, with instructions to enact and submit to this court a proposed remedial plan by April 1, 1997. The order retained jurisdiction in this court to act in default of timely action by the General Assembly, for approval of any plan submitted, and for such further proceedings as might be required.

The General Assembly enacted a proposed remedial plan on March 31, 1997 (1997 N.C. Sess. Laws, Ch. 11) and timely submitted it to this court for approval on April 1, 1997. Contemporaneously, the State submitted the plan for preclearance by the United States Department of Justice pursuant to § 5 of the Voting Rights Act and we deferred action on the plan pending action by the Justice Department. *See McDaniel v. Sanchez*, 452 U.S. 130 (1981).

While preclearance action was pending, we entered an order on May 28, 1997, denying intervention either of right or permissively to a number of African-American voters and associations who sought intervention both to suggest alternative remedial plans and to raise specific vote-dilution challenges under § 2 of the Voting Rights Act to certain districts in the proposed plan. We found no right to intervene under the provisions of Fed. R. Civ. P. 24(a), and declined to exercise our discretion to permit expansion of this action to include new § 2 dilution claims under Fed. R. Civ. P. 24(b).

On June 9, 1997, the Department of Justice precleared the plan pursuant to § 5 of the Voting Rights Act. On that same day, we entered an order directing plaintiffs and plaintiff-intervenors to advise the court by June 19, 1997, whether they intended to object to approval of the plan by this court and, if so, to identify the basis of their objections.

***SHAW* MEMORANDUM OPINION OF SEPTEMBER 12, 1997, CONTINUED . . .**

In response, the plaintiffs (both original and added), while asserting protectively the plan's inadequacy, disclaimed standing under the principles of *United States v. Hays*, 515 U.S. 737 (1995), to make any challenge to the plan because, they asserted, none of the original plaintiffs resided in the "new" Twelfth District, nor did any of the added plaintiffs reside in either the original or "new" Twelfth.

Separately responding, the plaintiff-intervenors, reasserting a position previously urged by motion, also declined to make substantive objection to the plan. They contended instead that the action, having been mooted by the legislative action, could only be dismissed without prejudice on that basis.

The state defendants, replying to these separate disclaimers of standing and assertions that the entire action was moot contended (1) that there were both plaintiffs and plaintiff-intervenors with the requisite standing to make substantive challenges to the submitted plan as to both Districts 1 and 12, and (2) that the action was not mooted by virtue of the legislative action. On this basis, they contended that the parties with standing should be required to make such challenges as they could, and that this court was empowered and obligated to exercise its continuing jurisdiction to review the submitted plan to determine whether it remedies the constitutional violation found by the Supreme Court.

***SHAW* MEMORANDUM OPINION OF SEPTEMBER 12, 1997, CONTINUED . . .**

II.

We first address the issues presented by the lack-of-standing and mootness positions taken by the plaintiffs and plaintiff-intervenors and disputed by the state defendants, and the consequent declination by the plaintiffs and plaintiff-intervenors to take any substantive position on the adequacy of the proposed remedial plan, then turn to the merits.

1. To the extent the plaintiff-intervenors' contention is that the entire action has been mooted by the legislature's enactment of a remedial plan, thereby depriving this court of jurisdiction even to approve or disapprove the plan and requiring a simple dismissal without prejudice, we reject the contention. Neither of the Supreme Court decisions relied upon for the proposition supports it; each is inapposite.

In *Louisiana v. Hays*, 116 S. Ct. 2542 (1996), a pending appeal from a three-judge court-ordered redistricting plan was dismissed as moot. In that case, the state legislature had in the interval independently adopted and enacted the plan. This obviously mooted any basis for Supreme Court review of the district court order, whereas here the very matter pending judicial review is the legislative enactment.

In *Johnson v. Northam*, No. TCA 94-40025-MMP, 1996 WL 297280 (N.D. Fla. May 31, 1996), a three-judge

court, after hearing the parties on the adequacies of a legislative remedial plan and approving it, then ordered the case "closed with respect to the remedies that have been rendered to correct any constitutional infirmity found" in the challenged plan. *Id.* at *1. Rather than demonstrating that a legislature's enactment and submission of a proposed remedial plan moots the action, the case demonstrates to the contrary the continuing jurisdiction of the court to act in judicial review of the enacted plan before "closing" the case.

We therefore conclude that legislative enactment of the submitted plan did not, by mooting the entire action, deprive this court of its expressly retained jurisdiction to review the plan for approval.

2. Though enactment of the plan submitted has not mooted the entire action, it has effectively mooted the *Shaw*-claim added by amendment to challenge District 1. As we expressly anticipated in deferring consideration of that added claim pending legislative action, the remedial plan significantly reconfigures the area formerly comprising that district, making the claim challenging its former configuration, location, and racial composition moot. Because as to that claim we therefore have no retained approval jurisdiction, it may be dismissed for mootness if the plan is approved as having adequately remedied the specific violation that has been determined as to District 12.

3. Assuming without deciding (the fact being disputed) that--as they assert--none of the plaintiffs resides in "new District 12," any resulting lack of standing on their part to challenge the constitutionality of that particular reconfiguration of districts cannot affect our retained jurisdiction to review the plan for its adequacy to remedy the violation found as to former District 12. We are doubtful that the non-inclusion of successful plaintiffs in any particular reconfigured district that is assumed to be *the* specific remedial district could be thought, because of the *Hays* residence requirement, to deprive them of standing to challenge the remedial plan as inadequate for the purpose at issue. But we need not attempt to decide that quirky problem growing out of the *Hays* standing rule. It suffices for our purposes that, for reasons satisfactory to themselves, the plaintiffs have formally chosen not to raise any substantive challenge to the adequacy of the plan to remedy the specific violation found as to former District 12.

In that circumstance, we may properly approve the plan as having remedied the specific violation found on the simple basis that its adequacy for that purpose has not been challenged by any party to the litigation. Under long-settled judicial redistricting principles, once a state legislature enacts a remedial plan that is then precleared under § 5 of the Voting Rights Act, that plan "will then be the governing law unless it, too, is challenged and found to violate the Constitution." *Wise*

v. Lipscomb, 437 U.S. 535, 540 (1978). That principle simply applies in this particular context the general presumption that, until successfully challenged, state legislative enactments are in conformity with constitutional requirements.

There having been no substantive challenge to the plan by any party to this action, we will therefore approve it as a constitutionally adequate remedy for the specific violation found by the Supreme Court in this case.

4. We close by noting the limited basis of the approval of the plan that we are empowered to give in the context of this litigation. It is limited by the dimensions of this civil action as that is defined by the parties and the claims properly before us. Here, that means that we only approve the plan as an adequate remedy for the specific violation of the individual equal protection rights of those plaintiffs who successfully challenged the legislature's creation of former District 12. Our approval thus does not--cannot--run beyond the plan's remedial adequacy with respect to those parties and the equal protection violation found as to former District 12.

III.

For the foregoing reasons, an order will be entered which approves the submitted plan to the extent noted, dissolves the injunction of July 30, 1996 against the conduct of

further congressional elections, and dismisses without prejudice, as moot, the claim added by amendment to challenge former congressional District 1.

U.S. CONST. amend. XIV, § 1

AMENDMENT XIV. CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION; APPOINTMENT OF REPRESENTATION;DISQUALIFICATION OF OFFICERS; PUBLIC DEBT; ENFORCEMENT

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

[This page intentionally left blank]

FED. R. CIV. P. 56

Rule 56. Summary Judgment

(a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof.

(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.

(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

FED. R. CIV. P. 56, CONTINUED . . .

(d) Case Not Fully Adjudicated on Motion. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) Form of Affidavits. Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise

FED. R. CIV. P. 56, CONTINUED . . .

provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

(f) When Affidavits are Unavailable. Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) Affidavits Made in Bad Faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused the other party to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

[This page intentionally left blank]

ORDER OF UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA, JUNE 22, 1998

[Caption Omitted in Printing]

This matter is before the Court on the Defendants' submission of a congressional districting plan for the 1998 congressional elections (the "1998 plan"). By Order dated April 21, 1998, this Court directed the North Carolina General Assembly to enact legislation revising the 1997 congressional districting plan and to submit copies to the Court. The General Assembly enacted House Bill 1394, Session Law 1998-2, redistricting the State of North Carolina's twelve congressional districts, and the Defendants timely submitted the 1998 plan to the Court. The Plaintiffs subsequently filed an opposition and objections to the 1998 plan, and the Defendants have responded to the Plaintiffs' objections. On June 8, 1998, the United States Department of Justice precleared the 1998 plan pursuant to Section 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973c, and this Court must now decide whether the 1998 plan complies with the Equal Protection Clause of the United States Constitution.

Because the Court cannot now say that race was the predominant factor in the drawing of District 12 in the 1998 congressional districting plan, the revised plan is not in violation of the United States Constitution, and the 1998 congressional elections should proceed as scheduled in the Court's April 21 Order.

ORDER, CONTINUED . . .

* * * *

In *Shaw v. Hunt*, the United States Supreme Court considered challenges to North Carolina's 1992 congressional districting plan (the "1992 plan") and held that the Twelfth Congressional District ("District 12") in the 1992 plan was drawn with race as the predominant factor, that the districting plan was not narrowly tailored to serve a compelling state interest, and that the 1992 plan violated the Equal Protection Clause. 509 U.S. 630, 113 S. Ct. 2816, 125 L. Ed. 2d 511 (1993) ("*Shaw I*"); 517 U.S. 899, 116 S. Ct. 1894, 135 L. Ed. 2d 207 (1996) ("*Shaw II*").

After the North Carolina General Assembly redrew the State's congressional districting plan in 1997, the Plaintiffs in this action challenged the constitutionality of the 1997 plan in this Court. Specifically, the Plaintiffs argued that the Twelfth and First Congressional Districts were unconstitutional racial gerrymanders. Each party moved for summary judgment, and in an Order dated April 3, 1998, the Court granted summary judgment in favor of the Plaintiffs with respect to District 12. Like the Supreme Court in *Shaw*, this Court held that race was the predominant factor in the drawing of District 12 in the 1997 plan, and that the district was violative of Equal Protection. In its April 3 Order, the Court instructed the Defendants to submit a new plan in which race was not the predominant factor in the drawing of District 12.

ORDER, CONTINUED . . .

The Court found that neither party could prevail as a matter of law with respect to District 1, and denied summary judgment as to that district. Neither this Court nor the Supreme Court in *Shaw* has made a legal ruling on the constitutionality of District I under the 1992, 1997, or 1998 congressional districting plans.

* * * *

In *Wise v. Lipscomb* the Supreme Court advised that "[w]hen a federal court declares an existing apportionment scheme unconstitutional, it is . . . appropriate, whenever practicable, to afford a reasonable opportunity for the legislature to meet constitutional requirements by adopting a substitute measure rather than for the federal court to devise and order into effect its own plan." 437 U.S. 535, 540, 98 S. Ct. 2493, 2497, 57 L. Ed. 2d 411 (1978). In reevaluating a substitute districting plan, the court must be cognizant that "a state's freedom of choice to devise a substitute for an apportionment plan found unconstitutional, either in whole or in part, should not be restricted beyond the clear commands of the Equal Protection Clause." *Id.* (quoting *Bums v. Richardson,* 384 U.S. 73, 85, 86 S. Ct. 1286, 1293, 16 L. Ed. 2d 376 (1966)). Finally, as the Supreme Court has noted, because "federal court review of districting legislation represents a serious intrusion on the most vital of local functions," this Court must "exercise extraordinary caution in adjudicating" the issues now before it. *Miller v. Johnson*, 515 U.S. 900, 916, 115 S. Ct. 2475, 2488, 132 L. Ed. 2d 762 (1995).

ORDER, CONTINUED . . .

Because this Court held only that District 12 in the 1997 plan unconstitutionally used race as the predominant factor in drawing District 12, the Court is now limited to deciding whether race was the predominant factor in the redrawing of District 12 in the 1998 plan. In reviewing the General Assembly's 1998 plan, the Court now concludes that on the record now before us that race cannot be held to have been the predominant factor in redrawing District 12. In enacting the 1998 plan, the General Assembly aimed to specifically address this Court's concerns about District 12. Thus, the present showing supports the proposition that the primary goal of the legislature in drafting the new plan was "to eliminate the constitutional defects in District 12." Aff. of Gerry F. Cohen. The State also hoped to change as few districts as possible, to maintain the partisan balance of the State's congressional delegation, to keep incumbents in separate districts and preserve the cores of those districts, and to reduce the division of counties and cities, especially where the Court found the divisions were based on racial lines. *Id.*

With the foregoing in mind, the General Assembly successfully addressed the concerns noted by the Court in its Memorandum Opinion for the purposes of the instant Order. Thus, the 1998 plan includes a Twelfth Congressional District with fewer counties, fewer divided counties, a more "regular" geographic shape, fewer divided towns, and higher dispersion and perimeter compactness measures. District 12 now contains five, rather than six, counties, and one of those counties is

whole. District 12 no longer contains any part of the City of Greensboro or Guilford County. The 1998 plan no longer divides Thomasville, Salisbury, Spencer, or Statesville. The new plan also addresses the Court's concern that it not assign precincts on a racial basis. While the Court noted in its Memorandum Opinion that the 1997 plan excepted from District 12 many adjacent "voting precincts with less than 35 percent African-American population, but heavily Democratic voting registrations," the 1998 plan includes fourteen precincts in Mecklenburg County in which previous Democratic performance was sufficient to further the State's interest in maintaining the partisan balance within the congressional delegation. The General Assembly also added several Forsyth County precincts to smooth and regularize the District's boundaries. These changes resulted in a total African-American population in District 12 of 35 percent of the total population of the district, down from 46 percent under the 1997 plan.

• • • •

Based on the foregoing, the Court now accepts the 1998 plan as written. The 1998 congressional elections will thus proceed under this plan, as scheduled in this Court's April 21, 1998, Order. As noted above, neither this Court nor any other has made a legal ruling on the constitutionality of District 1. The 1998 plan is only approved with respect to the 1998 congressional elections, but the Court reserves jurisdiction with regard to the constitutionality of District I under this plan and as to District 12 should new evidence emerge. This matter

should therefore proceed with discovery and trial accordingly. The parties are ordered to submit proposed discovery schedules to the Court on or before June 30, 1998.

SO ORDERED.

This 19th day of June, 1998.

SAM J. ERVIN, III
United States Circuit Judge
TERRENCE W. BOYLE
Chief United States District Judge
RICHARD L. VOORHEES
United States District Judge

By: /s/ TERRENCE W. BOYLE
CHIEF UNITED STATES DISTRICT

***SHAW, ET AL. V. HUNT, ET AL.*, CA NO. 92-202-CIV-5-BR, ORDER OF UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA, JUNE 9, 1997**

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION
CIVIL ACTION NO. 92-202-CIV-5-BR

RUTH O. SHAW, *et al.*,)
Plaintiffs,)
)
JAMES ARTHUR "ART" POPE, *et al.*,)
Plaintiff-Intervenors,)
v.)
GOVERNOR JAMES B. HUNT, in his official)
capacity as Governor of the State of North)
Carolina, *et al.*,)
Defendants,)
)
RALPH GINGLES, *et al.*,)
Defendant-Intervenors.)

ORDER

The United States Department of Justice has precleared the congressional districting plan submitted to this court on 1 April 1997. The court hereby ORDERS plaintiffs and plaintiff-

***SHAW* ORDER OF JUNE 9, 1997, CONTINUED . . .**

intervenors to advise the court by 19 June 1997 whether they intend to claim that the plan should not be approved by the court because it does not cure the constitutional defects in the former plan and to identify the basis for that claim.

This 9th day of June, 1997.

J. DICKSON PHILLIPS, JR.
Senior United States Circuit Judge
RICHARD L. VOORHEERS
Chief United States District Judge
W. EARL BRITT
United States District Judge

/s/ W. Earl Britt
United States District Judge

***SHAW, ET AL. V. HUNT, ET AL.*, CA NO. 92-202-CIV-5-BR, PLAINTIFFS' RESPONSE TO ORDER OF JUNE 9, 1997, JUNE 19, 1997**

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION
CIVIL ACTION NO. 92-202-CIV-5-BR

RUTH O. SHAW, *et al.*,)
Plaintiffs,)
)
JAMES ARTHUR "ART" POPE, *et al.*,)
Plaintiff-Intervenors,)
v.)
GOVERNOR JAMES B. HUNT, in his official capacity as Governor of the State of North Carolina, *et al.*,)
Defendants,)
)
RALPH GINGLES, *et al.*,)
Defendant-Intervenors.)

RESPONSE TO ORDER OF JUNE 9, 1997

The Plaintiffs respond as follows to the Court's Order of June 9, 1997, that they and Plaintiff-Intervenors advise the Court whether they intend to claim that the plan precleared by

PLAINTIFFS' RESPONSE, CONTINUED . . .

the Department of Justice does not cure constitutional defects in the former plan and, if so, what is the basis for the claim:

1. The original Plaintiffs, as well as the three additional Plaintiffs, believe that the new plan does not adequately cure the constitutional defects in the former plan, which the Supreme Court held to be unconstitutional. *Shaw v. Hunt*, 116 S.Ct. 1894 (1996).

2. Like its predecessor, the new plan was predominately motivated by race, and does not survive "strict scrutiny."

3. The Supreme Court found that in the earlier plan the Twelfth District was not narrowly tailored. Furthermore, a comparison of the new plan's majority-black First District with the majority-black First District of the earlier plan makes clear that the First District in the earlier plan was also race-motivated, not "narrowly tailored," and could have been far more compact and more consistent with "communities of interest."

4. The new plan fragments counties and cities unnecessarily, ignores communities of interest, and remains bizarre in appearance. The differences between the new plan's majority-black Twelfth District and the unconstitutional majority-black Twelfth District of the earlier plan are cosmetic,

and the creation of the new Twelfth District was predominately motivated by race.

5. The Twelfth District in the new plan is based on the racially gerrymandered, unconstitutional Twelfth District in the original 1992 plan and the First District in the new plan is based on the racially gerrymandered, unconstitutional First District in the original 1992 plan. Thus, each of these districts improperly relies on the unconstitutional earlier plan and so violates the principles established in *Abrams v. Johnson*, Nos. 95-1425, 95-1460, 1997 U.S. Lexis 3863, which was decided today, June 19, 1997. Likewise, the Twelfth and First Districts in the new plan reflect the continuing efforts of the Department of Justice to interpret and apply sections of the Voting Rights Act in an unconstitutional manner; and also for this reason the new plan violates *Abrams v. Johnson*. The relationship between the new plan and the original plan that was held unconstitutional in *Shaw v. Hunt* is so close that the new plan must be treated as the "fruit of the poisonous tree" and held to be tainted by the violations of equal protection in the earlier plan.

6. By virtue of the changes that have been made by the redistricting plan submitted to this Court on April 1, 1997, none of the original Plaintiffs appear to have standing to challenge the new plan. *United States v. Hays*, 115 S.Ct. 2431 (1995). The additional Plaintiffs do not reside in the Twelfth

District as originally constituted, nor in the new Twelfth District.

7. Because of the lack of standing of the Plaintiffs, there appears to be no matter at issue before this Court with respect to the new redistricting plan. Although Plaintiffs believe and claim that the new plan is unconstitutional, they recognize that due to their lack of standing, any attack on the constitutionality of the new redistricting plan should be undertaken in a separate action maintained by persons who have standing.

WHEREFORE, Plaintiffs pray this Court:

1. That the Court expressly find that the First District, as configured in the earlier plan, was unconstitutional because of the clear absence of narrow-tailoring;

2. That this Court not approve or otherwise rule on the validity of the precleared congressional redistricting plan submitted to it on April 1, 1997; but if it does rule, that it hold the new plan to be unconstitutional;

3. That the Court dismiss this action without prejudice to the right of any person having standing to maintain a separate action attacking the constitutionality of the precleared congressional redistricting plan.

PLAINTIFFS' RESPONSE, CONTINUED . . .

Respectfully submitted this the 19th day of June 1997.

/s/ Robinson 0. Everett
Attorney for Plaintiffs
N.C. State Bar No. 1384
301 West Main St., Suite 300
Durham, North Carolina 27702
Telephone: (919) 682-5691

/s/ Martin B. McGee
Attorney for Plaintiffs
N.C. State Bar No. 22198
147 Union Street South
P.O. Box 810
Concord, North Carolina 28026-0810
Telephone: (704) 782-1173

[Certificate of Service Omitted in Printing]

[This page intentionally left blank]

Supreme Court, U.S.
FILED
AUG 26 1998
OFFICE OF THE CLERK

No. 98-85

IN THE

Supreme Court of the United States

October Term, 1997

JAMES B. HUNT, JR., in his official capacity as Governor of the State of North Carolina, *et al.*,
Appellants,

v.

MARTIN CROMARTIE, *et al.*,
Appellees.

ON APPEAL
FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA

MOTION TO DISMISS OR, IN THE ALTERNATIVE, TO AFFIRM

MARTIN B. MCGEE
Williams, Boger, Grady, Davis & Tuttle, P.A.
P.O. Box 810
Concord, NC 28026-0810
(704) 782-1173

ROBINSON O. EVERETT*
Everett & Everett
P.O. Box 586
Durham, NC 27702
(919) 682-5691

**Counsel of Record*

QUESTIONS PRESENTED

1. Should the appeal be dismissed because appellants have not properly preserved the constitutional issues for review by this Court?

2. Were appellees free to challenge the 1997 redistricting plan because appellants failed to plead claim preclusion by reason of an earlier judgment in a different action, the appellees were not in privity with the parties to that action, and the earlier judgment expressly allowed actions to challenge the 1997 plan?

3. May a three-judge district court enter summary judgment that a redistricting plan is unconstitutional when undisputed evidence as to the shape of a challenged district, its violation of traditional race-neutral redistricting principles, and the racial demographics of that district establish clearly that a racial purpose was predominant in its creation?

4. Even though not majority-black, is a congressional district subject to strict scrutiny under the Equal Protection clause when its irregular shape, its use of "white corridors" to link three urban concentrations of African-Americans, and its violation of race-neutral redistricting criteria combine with other evidence to establish clearly that race was the primary motive for its creation?

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

COUNTERSTATEMENT OF THE CASE 2

A. The 1992 Redistricting Plan 2

B. The 1997 Redistricting Plan 5

C. The 1998 Redistricting Plan 7

SUMMARY OF THE ARGUMENT 8

ARGUMENT 10

I. THE APPEAL SHOULD BE DISMISSED AS NONJUSTICIABLE 10

II. APPELLEES WERE NOT PRECLUDED FROM CHALLENGING THE 1997 REDISTRICTING PLAN 14

A. Appellants' assertion of claim preclusion is untimely and should be disregarded 14

B. The *Shaw* plaintiffs were not privies or "virtual representatives" of appellees 15

C. The district court conducting the remedial phase of *Shaw v. Hunt* specifically provided in its order and opinion that its decision only applied to the plaintiffs and claim identified by the Supreme Court before remand 18

III. THE DISTRICT COURT PROPERLY GRANTED SUMMARY JUDGMENT ON THE UNCONSTITUTIONALITY OF DISTRICT 12 19

A. The shape and demographics of District 12 and its disregard of traditional redistricting principles prove the predominantly racial motive ... 21

B. Direct evidence confirms the predominantly racial motive in drawing District 12 23

IV. DISTRICT 12 IS SUBJECT TO STRICT SCRUTINY UNDER THE EQUAL PROTECTION CLAUSE 29

CONCLUSION 30

TABLE OF AUTHORITIES

CASES:

Aleyska Pipeline Serv. Co. v. U.S. E.P.A., 856 F.2d 309 (D.C. Cir. 1988) 20

Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986) ... 20

Babbitt v. United Farm-Workers Union, 442 U.S. 289 (1979) 10

Benson and Ford, Inc. v. Wanda Petroleum Co., 833 F.2d 1172 (5th Cir. 1987) 16

Blonder-Tongue Lab., Inc. v. University of Ill., 402 U.S. 313 (1971) 14

Bush v. Vera, 116 S. Ct. 1941 (1996) 26, 29, 30

Cromartie v. Hunt, 118 S. Ct. 1510 (1998) 7

Cromwell v. County of Sac, 94 U.S. 351 (1876) 15

Crowe v. Cherokee Wonderland, Inc., 379 F.2d 51 (4th Cir. 1967) 14

Daly v. High, No. 5:97-CV-750-BO (E.D.N.C.) 6, 7, 12

Explosives Corp. of Am. v. Garlam Enters., 817 F.2d 894 (1st Cir. 1987) 14

Hansberry v. Lee, 311 U.S. 32 (1940) 15

In re Shaw et al., 518 U.S. 1045 (1996) 5

Jaffree v. Wallace, 837 F.2d 1461 (11th Cir. 1988) 16

Kern Oil & Ref. Co. v. Tenneco Oil Co., 840 F.2d 730 (9th Cir.), *cert. denied*, 488 U.S. 948 (1988) 14

Lawyer v. Department of Justice, 117 S. Ct. 2186 (1997) 24, 29

Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986) 19

Miller v. Johnson, 515 U.S. 900 (1995) 2, 3, 29, 30

Nardone v. United States, 308 U.S. 338 (1939) 19

Pope v. Blue, 809 F. Supp. 392 (W.D.N.C. 1992), *aff'd*, 506 U.S. 801 (1992) 3

Raines v. Byrd, 117 S. Ct. 2312 (1997) 9

Ross v. Communications Satellite Corp., 759 F.2d 355 (4th Cir. 1985) 20

Royal Ins. Co. of Am. v. Quinn-L Capital Corp., 960 F.2d 1286 (5th Cir. 1992) 16

School Bd. of the City of Richmond v. Baliles, 829 F.2d 1308 (4th Cir. 1987) 19

Shaw v. Barr, 808 F. Supp. 461 (1992), *rev'd in part*, 509 U.S. 630 (1992) 3

Shaw v. Hunt (E.D.N.C. Sept. 12, 1997) ..... *passim*

Shaw v. Hunt, 517 U.S. 899 (1996) ..... *passim*

Shaw v. Hunt, 861 F. Supp. 408 (E.D.N.C. 1994) 4

Shaw v. Reno, 509 U.S. 630 (1993) 3, 24, 29

State v. Wall, 271 S.E.2d 363 (N.C. 1967) 11

Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971) 19, 27

Thornburg v. Gingles, 478 U.S. 30, 50-51 (1986) 30

Totalpan Corp. of Am. v. Colborne, 14 F.3d 824 (2d Cir. 1994) 14

Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464 (1982). 9

White v. American Airlines, Inc., 915 F.2d 1414 (10th Cir. 1990) 14

Wong Sun v. United States, 371 U.S. 471 (1963) 19

CONSTITUTIONAL PROVISIONS:

U.S. Const., Art. III, § 2 ..... 8, 9

RULES:

Fed. R. Civ. Proc. 42(a) 18

Fed. R. Civ. Proc. 56(c) 19

Fed. R. Civ. Proc. 8(c) 13

Fed. R. Evid. 201 20

STATUTORY PROVISIONS:

1997 N.C. Sess. Laws 1997-11 11

1997 N.C. Sess. Laws 1998-2 10-12

28 U.S.C. § 1253 8

42 U.S.C. § 1973b 2

TREATISES:

18 C. Wright, *et al.*, *Federal Practice & Procedure* § 4405 (Supp. 1998) 14

18 James Moore, *et al.*, *Moore's Federal Practice* § 131.40[1] (3d ed. 1998) 15

18 James Moore, *et al.*, *Moore's Federal Practice* § 131.50[5] (3d ed. 1998) 14

Wigmore, *Evidence* §§ 1040, 1060 (1972 ed.) 28

No. 98-85

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1997

JAMES B. HUNT, JR., in his official capacity as Governor of the State of North Carolina, *et al.*,
Appellants,

v.

MARTIN CROMARTIE, *et al.*,
Appellees.

ON APPEAL
FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA

MOTION TO DISMISS OR, IN THE ALTERNATIVE, TO AFFIRM

Pursuant to Rule 18.6, appellees move to dismiss the appeal on the ground that appellants have failed to present any justiciable issue for review by this Court, or, in the alternative, to affirm the judgment sought to be reviewed because the court below properly granted summary judgment and appellants have not raised a substantial question meriting review by this Court.

COUNTERSTATEMENT OF THE CASE

To provide the Court a better perspective as to the issues appellants seek to raise, appellees (plaintiffs below) submit their Counterstatement. It begins with the racially gerrymandered 1992 North Carolina redistricting plan, which this Court held unconstitutional in *Shaw v. Hunt*, 517 U.S. 899 (1996) (hereinafter "*Shaw II*").

A. The 1992 Redistricting Plan

In response to the 1990 census, which revealed that North Carolina was entitled to an additional congressional seat, the General Assembly enacted in 1991 a redistricting plan that included a single majority-black district. The Department of Justice, relying upon its erroneous "maximization" interpretation of Section 5 of the Voting Rights Act, 42 U.S.C. § 1973b, *see Miller v. Johnson*, 515 U.S. 900 (1995), denied preclearance of this redistricting plan because it lacked a second majority-black district. Soon thereafter, in January 1992, the General Assembly enacted a new plan, which contained two majority-black districts – the First and the Twelfth. Each had a "bizarre" shape, as did several other districts. The First District was in the northeastern part of North Carolina, where the percentage of African-Americans in the total population is greatest. The Twelfth District wound in a "serpentine" manner through the Piedmont region, following generally along highway I-85 from Gastonia to Durham, and used "white corridors" to connect concentrations of black citizens in Gastonia, Charlotte, Winston-Salem, Greensboro, High Point, and Durham. The Department of Justice swiftly precleared this plan.

Under the auspices of the Republican Party, a constitutional attack was launched against this plan on the ground that it was a political gerrymander intended to assist Democrats. This challenge was promptly rejected by a three-

judge district court. *See Pope v. Blue*, 809 F. Supp. 392 (W.D.N.C. 1992), *aff'd*, 506 U.S. 801 (1992). At this time the state defendants were asserting that the plan could not be attacked as a political gerrymander because it actually was based on race and resulted from preclearance requirements of the Department of Justice.

Shortly after this challenge had failed, five registered voters in Durham, North Carolina – a city bisected by the Twelfth District – filed suit against various federal and state defendants. They alleged that the 1992 redistricting plan was motivated by race and was enacted to assure the election of African-Americans to Congress from the First and Twelfth districts.[1] As to the state defendants, the action was predicated, *inter alia*, on a violation of the plaintiffs' right to equal protection under the Fourteenth Amendment – a claim which this Court later recognized as "analytically distinct." *Shaw v. Reno*, 509 U.S. 630, 652 (1993) (hereinafter "*Shaw I*"); *Miller*, 515 U.S. at 911. After the three-judge district court dismissed the suit as to all the defendants,[2] the plaintiffs – one of whom acted as their attorney – appealed to this Court, which noted probable jurisdiction. When the appeal was subsequently argued before the Court, counsel for the state-defendants readily acknowledged that the redistricting plan was based on race.[3]

---

[1]Of course, each of these two representatives would be a Democrat since 95% or more of the African-Americans in North Carolina are registered as Democrats.

[2]*See Shaw v. Barr*, 808 F. Supp. 461 (1992), *rev'd in part*, 509 U.S. 630 (1992).

[3]*See* oral argument in *Shaw I*, Tr. at 14, 22 ("[T]he North Carolina General Assembly intentionally created two majority-minority congressional districts." ... "There's no dispute here over what the state's purpose is. There's a dispute over how to characterize it legally, but we're not in a disagreement over what the state legislature was trying to do" (H. Jefferson Powell, on behalf of the state appellees)).

After this Court reversed the lower court and remanded the case for trial, *see Shaw I*, the state defendants radically changed their position and claimed that, although considered by the General Assembly, race had not been a predominant motive in drawing the two challenged districts. Although these districts obviously were not "geographically compact,"[4] the defendants insisted that they were "functionally compact." Nevertheless, the District Court readily concluded that both districts were race-based – although a majority of the three-judge court held that the two districts could survive strict scrutiny. *See Shaw v. Hunt*, 861 F. Supp. 408 (E.D.N.C. 1994).

On appeal by the plaintiffs to this Court, the defendants continued to assert that neither the First nor the Twelfth District was motivated by race.[5] However, on June 13, 1996 the Court held that the creation of the Twelfth District had been motivated predominantly by race and that, contrary to the lower court's decision, this district could not survive strict scrutiny since it was not "narrowly tailored." *Shaw II*. Because none of the plaintiff-appellants in that case were registered to vote in the First District, the Court ruled that they lacked standing to challenge that district and therefore its constitutionality would not be decided. *See id.* at 904. The case was remanded for further proceedings.

Shortly thereafter, Martin Cromartie and two other persons filed suit in the Eastern District of North Carolina to challenge the First District as an unconstitutional racial gerrymander. Since all three plaintiffs were registered to vote in that district, they clearly had standing under *Shaw II*.

---

[4]*See* Defendant-Appellants' Appendix at 61a (hereinafter "App."). The Justices will probably recall the much larger map of the 1992 plan which was lodged with the Court and used by counsel for plaintiff-appellants in the oral argument of each *Shaw* appeal.

[5]Because the five plaintiffs were white, the state defendants also contested the ruling of the three-judge district court that they had standing.

Meanwhile, the successful appellants in *Shaw II* were seeking without success to persuade the General Assembly to enact a new redistricting plan for the 1996 elections. Those plaintiffs also were unable to convince the three-judge district court that it should draw a redistricting plan for the 1996 elections unless the General Assembly promptly did so.[6] However, the district court did rule that unless the Legislature drew a new plan by April 1, 1997, the court would itself do so. In light of the developments in the *Shaw* litigation, Cromartie and his fellow plaintiffs agreed to a stay of proceedings in their action.

B. The 1997 Redistricting Plan

On March 31, 1997, the General Assembly enacted a new redistricting plan whereunder Durham County was removed from the Twelfth District. Since all five *Shaw* plaintiffs resided in Durham, they no longer were registered to vote in the Twelfth District; and so under *Shaw II* they lacked standing to challenge that district.[7] After the Department of Justice granted preclearance of the 1997 plan, the three-judge district court entered an order on June 9, 1997 directing the *Shaw* plaintiffs to advise the court within ten days "whether they intend to claim that the plan should not be approved by the court because it does not cure the constitutional defects in the former plan and to identify the basis for that claim." App. at 181a–182a. In their response, the plaintiffs stated their view that the 1997 plan had continuing constitutional defects, but forthrightly they pointed out that "due to their lack of standing,

---

[6]See Judgment in *Shaw v. Hunt* (No. 92-202-CIV-5-BR, filed July 31, 1996). Like most of the rulings of that court, it was by divided vote. Subsequently, the *Shaw* plaintiffs were unsuccessful in seeking a writ of mandamus from this Court to require the district court to adopt a remedial plan for the 1996 elections. *In re Shaw et al.*, 518 U.S. 1045 (1996).

[7]Moreover, unlike the 1992 plan, Durham County was not divided and was placed in a geographically compact District 4. *See* App. at 59a.

any attack on the constitutionality of the new redistricting plan should be undertaken in a separate action maintained by persons who have standing." *Id.* at 186a.

The subsequent memorandum opinion entered by the district court on September 12, 1997 (*id.* at 159a–168a) approved the plan but specifically stated:

> [W]e close by noting the limited basis of the approval of the plan that we are empowered to give in the context of this litigation. It is limited by the dimensions of this civil action as that is defined by the parties and the claims properly before us. Here, that means that we only approve the plan as an adequate remedy for the specific violation of the individual equal protection rights of those plaintiffs who successfully challenged the legislature's creation of former District 12. Our approval thus does not – cannot – run beyond the plan's remedial adequacy with respect to those parties and the equal protection violation found as to former District 12.

Id. at 167a.

In October 1997, the district court dissolved the stay order entered previously in the Cromartie action; and an amended complaint was filed, which added plaintiffs from the Twelfth District and additional plaintiffs from the First District. The state defendants obtained a short extension of time to answer and filed a motion in *Shaw v. Hunt* to consolidate with it the action that had been filed by Cromartie as well as a different action, *Daly v. High*, No. 5:97-CV-750-BO (E.D.N.C.),[8] which challenged both North Carolina's

[8]The case is now captioned *Daly v. Leake* and will be referred to hereafter as *Daly*.

redistricting plan and its legislative reapportionment. This motion was denied by the *Shaw* three-judge court. *See* Plaintiff-Appellees' Appendix at 1a (hereinafter "P-A App.").

On January 15, 1998 Cromartie's action was assigned to the three-judge district court which was considering the *Daly* case.[9] Thereafter, the court proceeded quickly to hear conflicting motions for summary judgment filed by the Cromartie plaintiffs and the State defendants. The court rendered summary judgment against the defendants and enjoined use of the 1997 redistricting plan in the 1998 primaries and elections. *See* App. at 45a. The defendants unsuccessfully sought a stay order from the district court and then appealed its denial of a stay to this Court, which also denied their application for a stay.[10] The defendants subsequently applied fruitlessly to the district court for leave to conduct primary elections under the 1997 plan in six congressional districts in eastern North Carolina that had been created by that plan.

C. The 1998 Redistricting Plan

The district court had allowed the General Assembly until May 22, 1998 to submit a redistricting plan for the 1998 elections. On May 21, 1998, a plan was enacted which left the First District as it had been drawn in 1997, but modified the Twelfth District. The plaintiffs filed their objections to the 1998 plan within the three day period allotted by the district court, and the state defendants responded in a like period. Subsequently, the plan was precleared by the Department of Justice and then, on June 22, 1998, was approved by the three-

[9]Until that time the *Cromartie* action had been pending before Judge Malcolm Howard, and no three-judge panel had been designated. The panel for *Daly* had been designated previously.

[10]*See Cromartie v. Hunt*, 118 S. Ct. 1510 (1998) (Stevens, Ginsburg, and Breyer, JJ., dissenting).

judge district court for the 1998 election. However, the court noted that as to the First District neither the plaintiffs' motion for summary judgment nor that of the defendants had been granted. Therefore a trial would be necessary. *See* App. at 179a-80a. Moreover, at trial the plaintiffs could offer further evidence as to the racial motive for the Twelfth District.[11] *See id.* Pursuant to 28 U.S.C. § 1253, plaintiffs, who are appellees in the present appeal, filed notice of appeal from the district court's denial of their requested injunction.

SUMMARY OF THE ARGUMENT

The appeal from the decision of the district court should be dismissed because appellants have not presented to the Court a justiciable "case or controversy" for decision. *See* U.S. Const., Art. III, § 2. The language of the Session Law enacting the 1998 plan does not suffice to preserve for appellate review the issue of the constitutionality of the 1997 plan. The defendant-appellants have estopped themselves from denying that this issue is moot.

If the appeal is not dismissed for want of a "case or controversy," the judgment entered below should be affirmed. Appellants' attempt to invoke claim preclusion is barred by their failure to plead such a defense in their answer or otherwise to raise it in a timely manner. Even if appellants had timely asserted a defense of claim preclusion, their argument would fail on the merits, for no privity existed between the present appellees and the parties involved in the earlier judgment. Indeed, the terms of the original judgment of the three-judge district court in September 1997 make clear that the present appellees were not precluded by that judgment. *See* App. at 167a.

The unrefuted evidence presented by appellees to the

[11]In preparation for that trial, a scheduling order has now been entered which contemplates completion of discovery by December 11, 1998.

three-judge district court demonstrates clearly that summary judgment was properly granted. As this Court has made clear, circumstantial evidence alone can prove a predominantly racial motive. Appellees' unrefuted evidence of lack of compactness, splitting of counties and towns along racial lines, and use of predominantly white, narrow "land bridges" to connect concentrations of African-Americans into a single tortured district amply established the legislature's predominantly racial motive in drawing the Twelfth District. Although appellees' strong circumstantial evidence, standing alone, proved the General Assembly's predominantly racial motive, direct evidence also supports appellees' case. When considered in context, statements made by the legislators who drafted the 1997 redistricting plan constitute implied admissions that race had predominated in drawing the boundaries of the Twelfth District. The purported justifications of the plan were unsuccessful attempts to disguise the legislators' racial motive and to preserve the products of the unconstitutional 1992 plan.

In granting summary judgment, the district court did not lower the threshold for strict scrutiny, and its decision conformed to the precedents of this Court. Although in defending the 1997 plan, appellants have emphasized that District 12 is only 46.67 percent black, rather than majority-black, this fact provides no excuse for the racial gerrymander.

ARGUMENT

I. THE APPEAL SHOULD BE DISMISSED AS NONJUSTICIABLE.

The "judicial power" of the United States can be invoked only if there is a "case or controversy." *See* U.S. Const., Art. III, § 2. Indeed, "case" or "controversy" is a "'bedrock requirement.'" *See Raines v. Byrd*, 117 S. Ct. 2312, 2317 (1997) (quoting *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*,

454 U.S. 464, 471 (1982)). Admittedly, the difference between "abstract question and 'case or controversy' is one of degree ... and is not discernible by any precise test." *Babbitt v. United Farm-Workers Union*, 442 U.S. 289, 297 (1979).

Occasionally when a statute is superseded by a later enactment, issues arising under the former statute become moot and are nonjusticiable. Perhaps the General Assembly had this possibility in mind when it employed this language in enacting the 1998 redistricting plan:

> Section 1. G.S. 163-201 reads as rewritten:
>
> (a) For the purpose of nominating and electing members of the House of Representatives of the Congress of the United States in 1998 and every two years thereafter, the State of North Carolina shall be divided into 12 districts as follows:
>
> * * *
>
> Section 1.1: The plan adopted by this act is effective for the elections for the years 1998 and 2000 *unless the United States Supreme Court reverses the decision holding unconstitutional G.S. 163-201(a) as it existed prior to the enactment of this act.*

1997 N.C. Sess. Laws 1998-2, enacted May 21, 1998 (emphasis added). Section 1.1 appears to be unprecedented.[12]

In enacting the 1997 redistricting plan, the General Assembly had included a provision for substitution of a

---

[12]In the General Assembly, Section 1.1 was deleted from the House Bill by the House Redistricting Committee but later was added back before the bill was passed in the North Carolina House of Representatives and sent to the Senate.

different plan if the 1997 plan were held unconstitutional because its districts lacked precise numerical equality.[13] On the other hand, Section 1.1 of the 1998 plan would substitute a previous plan for an existing plan that has not been held unconstitutional. Moreover, the substitution would be accomplished without any formal repeal of the more recent legislation or any specific enactment of the earlier plan.[14]

It is uncertain what event would qualify to make the 1998 plan not "effective for the elections for the years 1998 and 2000." For example, what ruling by this Court would be deemed to have "reverse[d] the decision holding unconstitutional G.S. 163-201(a) as it existed prior to the enactment of this act"? Appellees sought both a preliminary and a permanent injunction against use of the 1997 plan. Would a "reversal" have occurred if the Court held that appellees had not been entitled to summary judgment but were entitled to a preliminary injunction?[15] Furthermore, unless the Court concluded that the defendants had been entitled to

---

[13]The text of that provision is as follows:

> In the event that a court of competent jurisdiction holds that the plan enacted by section 2 of this act is invalid because the total population range violates the one-person, one-vote doctrine and that decision is not reversed, then the plan enacted by section 2 of this act in G.S. 163-201 is repealed and the following plan enacted in G.S. 163-201.

1997 N.C. Sess. Laws 1997-11, section 3, effective March 31, 1997.

[14]Whether the language of Section 1.1 would be sufficient to repeal Session Law 1998-2 or revive Session Law 1997-11 seems questionable. If the "reversal" were to occur after the 1998 election and new state legislators have been elected, applying Section 1.1 might be deemed to violate the principle that one legislature cannot bind a successor legislature. *See State v. Wall*, 271 S.E.2d 363, 369 (N.C. 1967).

[15]Whether to grant a preliminary injunction is to be determined in the trial court's discretion upon weighing likelihood of success against harms to the parties from granting or denying the injunction.

summary judgment as to the First and Twelfth districts under the 1997 plan, a trial would be necessary as to those districts.[16]

If, despite such uncertainty, Section 1.1 were applied, its application would create great confusion. Under its terms, Section 1.1 would apply even to the 1998 elections if this Court "reverses the decision" of the district court prior to the November 1998 election date. Since that possibility seems remote, probably the 1998 redistricting plan will govern election of the next members of Congress from North Carolina. If, however, this Court subsequently "reverses the decision holding G.S. 163-201 unconstitutional," and the 1997 plan comes into effect, its constitutionality probably would still have to be determined in a trial. Meanwhile, if the 1998 plan now in effect were superseded by the less geographically compact, more racially gerrymandered 1997 plan, the pending trial with respect to the 1998 plan might be mooted. This potential chaos that Section 1.1 could produce makes it highly unlikely that the General Assembly would ever allow it to be applied.

Under these circumstances appellees submit that Section 1.1 of the 1998 plan does not suffice to make justiciable the issues which appellants seek to raise in this appeal. Indeed, in adding Section 1.1 to the 1998 plan, the General Assembly made a transparent attempt to obtain from the Court an advisory opinion about the constitutionality of the superseded 1997 plan.

Moreover, appellants have now estopped themselves from claiming that the constitutionality of the 1997 plan is a justiciable issue. On July 22, 1998, appellants submitted to the three-judge district court a motion to consolidate this action with the *Daly* case. In the memorandum attached to the motion to consolidate, appellants state:

---

[16]The district court denied both parties' motions for summary judgment as to the First District in the 1997 plan, and presumably trial as to the First and Twelfth districts in that plan would be necessary.

> *Cromartie* includes a challenge to Congressional District 12 in the State's 1997 congressional plan, Section 2 of Chapter 11 of the 1997 Session Laws. *However, the challenge to District 12 has been rendered moot by the judgment of this Court declaring District 12 unconstitutional and the permanent injunction requiring the State to enact a new congressional plan ..., which substantially modified the boundaries of District 12.*

Mem. at 2, n.2 (P-A App. at 3a) (emphasis added).[17] Having represented to the lower court in this same action that the constitutional challenge to District 12 is moot, and appellants having made this representation after filing their jurisdictional statement, they are now estopped from pursuing their effort to obtain an advisory opinion from this Court – which hardly needs such a time-consuming distraction.

II. APPELLEES WERE NOT PRECLUDED FROM CHALLENGING THE 1997 REDISTRICTING PLAN.

A. Appellants' assertion of claim preclusion is untimely and should be disregarded.

The contention by appellants in their jurisdictional statement that claim preclusion bars the action brought by appellees comes much too late. Both the Federal Rules of Civil Procedure and well-settled case law clearly provide that *res judicata*, or claim preclusion, is an affirmative defense which must ordinarily be raised in the pleadings. *See* Fed. R. Civ.

---

[17]Ms. Tiare Smiley, Special Deputy Attorney General, signed both the jurisdictional statement and the motion to consolidate.

Proc. 8(c).[18] The defense of claim preclusion "cannot be raised for the first time on appeal." 18 C. Wright, *et al.*, *Federal Practice & Procedure* § 4405 (p. 35) (Supp. 1998).[19]

The rationale behind these procedural limitations is clear: to provide the opposing party a fair opportunity to meet the defense, *see Blonder-Tongue Lab., Inc. v. University of Ill.*, 402 U.S. 313, 350 (1971), and to serve the basic "policy of judicial economy that is integral to the preclusion doctrines, [which] is impeded if not defeated by excessive delay." 18 James Moore, *et al.*, *Moore's Federal Practice* § 131.50[5] (3d ed. 1998). Untimely assertion of a preclusion defense undercuts this basic policy of judicial economy, since the court hearing the case and the parties themselves will have already expended scarce time and resources in arguing the case and possibly docketing and briefing an appeal.

Appellants rely upon the September 12, 1997 order and memorandum opinion of the three-judge district court in *Shaw v. Hunt* (*see* App. at 157a, 159a) as a judgment that precludes the present claims. However, that judgment was entered more than two months before the appellants filed their answer on November 27, 1997; and they never sought to amend that answer. Moreover, appellants did not assert claim preclusion

---

[18]*See also Kern Oil & Ref. Co. v. Tenneco Oil Co.*, 840 F.2d 730, 735 (9th Cir.), *cert. denied*, 488 U.S. 948 (1988); *Crowe v. Cherokee Wonderland, Inc.*, 379 F.2d 51, 54 (4th Cir. 1967).

[19]If a case has progressed past the pleadings and is in the pre-trial or trial phase when an allegedly preclusive judgment is rendered in another case, the defense of claim preclusion must be asserted at that time – namely, as soon as the defense becomes available. *See Totalpan Corp. of Am. v. Colborne*, 14 F.3d 824, 832 (2d Cir. 1994); *see also White v. American Airlines, Inc.*, 915 F.2d 1414, 1424 (10th Cir. 1990) (holding defense "waived" when it had become available the week before trial but was not raised until one year after judgment); *Explosives Corp. of Am. v. Garlam Enters.*, 817 F.2d 894, 900-01 (1st Cir. 1987) (six months' delay in raising the defense was "inexcusable").

in their briefs supporting their motion for summary judgment and in opposing appellees' motion for preliminary injunction and summary judgment. Not until they filed their jurisdictional statement did appellants mention claim preclusion. Even assuming, contrary to the record, that appellants' assertion of claim preclusion were properly grounded in law or fact, their delay until appeal to raise this defense contradicts the often-expressed rationale for the doctrine of res judicata and constitutes waiver.

B. The *Shaw* plaintiffs were not privies or "virtual representatives" of appellees.

Even if appellants had asserted the defense at the proper stage of the proceedings, claim preclusion would not apply. The judgment relied on by appellants as "preclusive" of the appellees' claims is the September 12, 1997 order of the three-judge district court which conducted the remedial phase of *Shaw v. Hunt* (*see* App. at 159a). As to appellees and their claims, that judgment fails to satisfy the privity requirement of claim preclusion and as a result does not bar the claims presented by appellees.

In order for an earlier judgment to preclude a later claim, the original judgment must involve the same parties as the present case, or persons in privity with them.[20] *See Cromwell v. County of Sac*, 94 U.S. 351, 352 (1876). Moreover, the original judgment must be a final judgment rendered on the merits. *See id.* When a plaintiff in the current case was not a party to the original judgment, that plaintiff must be in privity with the original plaintiffs if the original judgment is to have any preclusive effect. *See Hansberry v. Lee*, 311

---

[20]Privity is generally defined as the existence of an express or implied legal relationship between two or more parties, such as family members, members of a class action, employers-employees, administrators, and executors. *See Moore's* § 131.40[1].

U.S. 32, 41-43 (1940) (describing privity in class actions). Closely related to the traditional concept of privity is the somewhat more recent notion of "virtual representation," which exists if the original plaintiff's interests are so closely aligned as to be identical with those of the present plaintiff. For this doctrine to apply, however, the parties must have more than a similarity of interests. Indeed, the Fifth Circuit has adopted a privity-like standard for virtual representation – the parties must enjoy an express or implied legal relationship to be "virtual representatives." *See Royal Ins. Co. of Am. v. Quinn-L Capital Corp.*, 960 F.2d 1286, 1297 (5th Cir. 1992).[21] Other circuits have abandoned the legal relationship requirement for a factor-based analysis, identifying as relevant criteria "participation in the first litigation, apparent consent to be bound, apparent tactical maneuvering [to avoid preclusion], and close relationships between the parties and nonparties." *Jaffree v. Wallace*, 837 F.2d 1461, 1467 (11th Cir. 1988) (finding that original plaintiff was virtual representative of current plaintiffs, who were his wife and children) (citation omitted).

In the context of the present case, the same-party/privity requirement is not satisfied. Although the September 1997 approval did constitute a final judgment on the merits for the *Shaw II* plaintiffs, the district court carefully excluded other parties from the judgment's effect:

> [W]e only approve the plan as an adequate remedy for the specific violation of the individual equal protection rights of those plaintiffs who successfully challenged the legislature's creation of former District 12. Our approval thus does not – cannot – run beyond the plan's remedial adequacy with respect to those parties and the equal protection violation found as to former District 12.

Shaw v. Hunt (E.D.N.C. Sept. 12, 1997) (App. at 167a). Thus the approval of the plan was a final judgment only as to those *Shaw* plaintiffs whose standing had been recognized by this Court in *Shaw II*. Those plaintiffs were all residents of Durham County, part of which was included in District 12 under the 1992 plan. The current appellees are residents of Edgecombe County in District 1 under the 1997 plan and Rowan, Guilford, and Mecklenburg counties in District 12. They have no express or implied legal relationship to any of the Durham County plaintiffs identified in the September 1997 judgment.

Appellants' assertion that the *Shaw* plaintiffs were "virtual representatives" of the current appellees also fails. The plaintiffs whose claims were resolved by the September 1997 order had successfully challenged the creation of District 12 by the 1992 redistricting plan. The present appellees, by contrast, challenged Districts 1 and 12 as drawn in the 1997 redistricting plan. Appellees may have a similarity of interests with the *Shaw* plaintiffs; but they lack the level of identification necessary for virtual representation.[22] That which might constitute virtual representation – e.g., consent to be bound, a close relationship between the parties, tactical maneuvering to avoid preclusion – is absent.

C. The district court conducting the remedial phase of *Shaw v. Hunt* specifically provided in its order and opinion that its decision only applied

---

[21] *See also Benson and Ford, Inc. v. Wanda Petroleum Co.*, 833 F.2d 1172, 1175 (5th Cir. 1987) (parties were represented by same attorney and asserted same claim based upon same facts, but due to absence of express or implied legal relationship later action was not precluded).

[22] The fact that the two sets of plaintiffs are represented by the same attorney is of little relevance. Indeed, it seems odd to suggest that an attorney experienced in redistricting litigation cannot represent those who seek his pro bono counsel.

to the plaintiffs and claim identified by the Supreme Court before remand.

In handling the remedial proceedings in *Shaw v. Hunt*, the district court's responsibility was to oversee the fashioning of a remedy to address the constitutional violations suffered by the original plaintiffs. Since this Court had dismissed the claims concerning the constitutionality of the First District, the district court had no authority to consider the 1997 plan's adequacy to remedy any constitutional flaw of the First District. Contrary to appellants' suggestion, potential constitutional challenges that might be made to the 1997 plan's First and Twelfth Districts by persons who had standing were not "snuffed out" by the order of September 12, 1997. To the contrary, in its memorandum opinion accompanying that order, the three-judge district court expressly noted the limitations on its approval and made no determination regarding the challenges to the 1997 plan that might be made by persons who had standing.[23]

III. THE DISTRICT COURT PROPERLY GRANTED SUMMARY JUDGMENT ON THE UNCONSTITUTIONALITY OF DISTRICT 12.

Assuming *arguendo* that appellees bore the burden of

---

[23]Further evidence of the separate identities of the present action and the *Shaw* remedial judgment is the *Shaw* panel's denial of the defendants' motion to consolidate *Shaw*, *Cromartie* and *Daly*. The *Shaw* defendants' motion, filed in October 1997, requested that the three cases be consolidated pursuant to Fed. R. Civ. Proc. 42(a) because they presented common issues of law and fact. Even though the threshold for consolidation is significantly less demanding than that required to establish claim preclusion or even to prove that an original plaintiff was a "virtual representative" of a later plaintiff, the court denied the motion and allowed the three cases to proceed independently. *See* P-A App. at 1a.

persuasion – which they dispute[24] – appellees nevertheless met the standard for summary judgment. Summary judgment is appropriate when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *See* Fed. R. Civ. Proc. 56(c). The moving party is entitled to summary judgment when a rational trier of fact, after considering the record as a whole, could not find for the non-moving party. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). The "mere existence of a scintilla of evidence" for the non-moving party's position is insufficient to defeat a properly supported motion; there must be enough evidence for a reasonable jury to find for the non-

---

[24]To obtain summary judgment, appellees were required by the district court to establish as an irrefutable fact that the General Assembly had a predominantly racial motivation in drawing the 1997 plan. Instead, the burden should have been placed on appellants to show that there was no racial motive and that there was no "vestige" of the 1992 racially-motivated plan. Only this approach is consistent with the Court's decisions in other fields of equal protection law. For example, in the school desegregation cases, once an equal protection violation had been proved, the local school authorities and the district courts were required to "eliminate ... all vestiges of state-imposed segregation." *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 15 (1971). Having established that continuing violation, a plaintiff is "entitled to the presumption that current disparities are causally related to prior segregation, and the burden of proving otherwise rests on the defendants." *School Bd. of the City of Richmond v. Baliles*, 829 F.2d 1308, 1311 (4th Cir. 1987). Likewise in criminal cases, the state must show that any "taint" caused by a violation of a defendant's rights has been attenuated and that there is no "fruit of the poisonous tree." *See Wong Sun v. United States*, 371 U.S. 471 (1963); *Nardone v. United States*, 308 U.S. 338 (1939). Although a broad scope should be allowed for legislative discretion, once it has been proved that this discretion has been improperly exercised the courts have a special responsibility to assure that the unconstitutional intent has been extinguished when the legislature takes remedial action. Since the General Assembly had enacted an unconstitutional redistricting plan in 1992, appellants should have been required to prove that the 1997 plan was not racially motivated.

moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986).[25]

To prove an equal protection violation in a redistricting case, the plaintiff may prove a race-based motive "*either through circumstantial evidence of a district's shape and demographics or* through more direct evidence going to legislative purpose." *Shaw II*, 517 U.S. at 905 (citations omitted) (emphasis added). Thus, circumstantial evidence alone may suffice to warrant summary judgment. Here there is an abundance of circumstantial evidence – much of which either was provided by appellants or was subject to judicial notice under Fed. R. Evid. 201. Moreover, upon analysis, the contradictions and hidden meanings in the statements of legislators help establish that the Twelfth District was drawn with a predominantly racial motive.

A. The shape and demographics of District 12 and its disregard of traditional redistricting principles prove the predominantly racial motive.

A visual comparison of the maps makes evident that the Twelfth District in the 1997 plan bears an unacceptable likeness to its predecessor "I-85" district in the 1992 plan[26] – the plan this Court held unconstitutional in 1996 (*Shaw II*).

---

[25]*See also Aleyska Pipeline Serv. Co. v. U.S. E.P.A.*, 856 F.2d 309, 314 (D.C. Cir. 1988) ("a motion for summary judgment adequately underpinned is not defeated simply by a bare opinion or an unaided claim that a factual controversy persists"); *Ross v. Communications Satellite Corp.*, 759 F.2d 355, 365 (4th Cir. 1985) ("[u]nsupported allegations as to motive do not confer talismanic immunity from Rule 56").

[26]*See* App. at 59a, 61a. Also, appellees are lodging with the Court four maps which were before the district court and which make even clearer that those who drafted the 1997 plan followed the race-based approach used in the 1992 plan.

The district "winds its way from Charlotte to Greensboro along the Interstate-85 corridor, making detours to pick up heavily African-American parts of cities such as Statesville, Salisbury, and Winston-Salem." *See* Mem. Op. (App. at 19a). District 12 splits all of its six counties; and it is the only congressional district in the 1997 plan that does not contain a single whole county. Significantly, the three largest of the six counties are divided along racial lines. As Dr. Ron Weber, a redistricting expert, points out:

> [T]he racial makeup of the parts of the six sub-divided counties assigned to District 12 include three with parts over 50 percent African-American .... Almost 75 percent of the total population in District 12 comes from the three county parts which are majority African-American in population ... [and which] are located at the extremes of the district.

Weber Decl. ¶ 18. Mecklenburg, Forsyth, and Guilford counties – which contain almost 75 percent of District 12's population – are divided in such a manner that the portion of each county which contains a majority of African-Americans is included in District 12, while the portion containing a greater concentration of white voters is excluded.[27] Dr. Weber also observes that the splitting of political subdivisions to maximize black population in the Twelfth District occurred not only for

---

[27]Under the 1997 plan, the portion of Mecklenburg County included in District 12 was 51.9% black and 45.9% white, while the portion of the county placed in neighboring District 9 was 90.4% white and a mere 7.2% black. The portion of Forsyth County included in the Twelfth was 72.9% black and 26.3% white, while the part of Forsyth included in District 5 was 87.7% white and only 11.1% black. The part of Guilford County included in District 12 was 51.5% black and 46.5% white, while the portion assigned to District 6 was 88.2% white and 10.2% black. *See* Weber Decl. at Table 2.

counties but also for cities and towns. The major cities in the Twelfth District – Charlotte, Greensboro, Winston-Salem, High Point and Statesville – are split along racial lines, with the precincts included in District 12 having a greater population of black citizens than the precincts left for other districts.[28] In addition to the egregious splitting of counties and cities along racial lines, the plan also employs narrow "land-bridges" to connect the far-flung communities of African-Americans and make surrounding districts contiguous.[29]

Appellees have also submitted other uncontroverted evidence as to the disregard for traditional districting principles – such as compactness and geographical integrity – in creating District 12 under the 1997 plan. For example, Professor Timothy O'Rourke's evaluation of the compactness of District 12 using recognized statistical methods reveals that of the United States' 435 congressional districts, "[i]f the 1992 rankings had remained unchanged, the [1997] version of the Twelfth would still stand as the 430th least compact district on the dispersion measure and it would rank 423 on the perimeter

---

[28]The portion of Charlotte included in District 12 is 59.5% black, while the portion left for District 9 is only 8.1% black. The portion of Greensboro placed in District 12 is 55.6% black, while the part of the city left for District 6 is only 10.7% black. The portion of Winston-Salem assigned to District 12 is 77.4% black, while the portion assigned to District 5 is only 16.1% black. The portion of High Point placed in District 12 is 51.4% black, while the portion in District 6 is only 11.7% black. In Statesville, the portion included in District 12 is 75.4% black, while the portion included in District 10 is only 18.9% black. *See* Weber Decl. at Table 4.

[29]For example, in District 12 "a narrow land bridge is used to connect Davidson County with the city of Greensboro in Guilford County." (Weber Decl. ¶ 31.) One precinct at the southern tip of District 12 is divided so that its northern half -- all precinct residents but one -- is in the Twelfth District, while its southern half -- only one person -- forms a two-mile wide land bridge connecting the otherwise non-contiguous wings of District 9. *See* O'Rourke Aff. ¶ 5(c); *see also* App. at 59a.

measure." O'Rourke Aff. ¶ 4(d). Indeed, the Twelfth District's dispersion and perimeter compactness figures fall below those of contested districts from four other states: Florida, Georgia, Illinois, and Texas. *See* Mem. Op. (App. at 21a).

B. Direct evidence confirms the predominantly racial motive in drawing District 12.

In submitting the 1997 plan for Section 5 preclearance, the State represented to the Department of Justice that five factors were emphasized in locating and shaping the Twelfth District. *See* App. at 63a. That representation is misleading in several respects.[30] Moreover, although "geographic compactness" is mentioned in the Section 5 submission as one of five factors considered in drawing the plan, the affidavit of Senator Roy A. Cooper, III, Chair of the Senate Redistricting Committee, omits it as a factor (App. at 72a), and that of Representative McMahan, Chairman of the House Redistricting Committee, makes no specific reference to geographic compactness as a factor that was considered.[31] *Id.* at 81a, 83a.

---

[30]Contrary to the State's representation, (1) the Twelfth District split all of its six counties; (2) it has a long "corridor" of predominantly white precincts to connect concentrations of blacks in Charlotte, Winston-Salem, and Greensboro -- a corridor only one precinct wide in many places; (3) it is not geographically compact and, indeed, ranks at the bottom of the compactness scale for congressional districts in North Carolina and nationally; (4) it is "functionally compact" only if "function" is equated to race; (5) it lacks "ease of communication" in any meaningful sense because the district's voters are divided between two Metropolitan Statistical Areas (MSA's) and spread over several media markets.

[31]It is typical of the inconsistencies and contradictions on the part of the state legislators and appellants that Senator Cooper declared in a committee meeting in March 1997, "We've strived to follow the direction of the Supreme Court to draw more geographically compact districts." State's Section 5 Submission, 97C-28F-4D(3) at 1. Yet Senator Cooper failed to acknowledge this effort in his affidavit, and appellants concede now that "the legislature did not ... select geographical compactness as a criterion

The spuriousness of the representations in the Section 5 submission is itself evidence of the effort to disguise the General Assembly's racial motive.[32]

The submission's reference to "functional compactness" as a factor in drawing the Twelfth District and the use of the same term by Senator Cooper in his affidavit (*id.* at 72a) reveal another tactic used to mask the legislature's racial motive.[33] Both the Section 5 submission and Senator Cooper define this term to mean "grouping together citizens of like interests and needs." *Id.* However, the separation of predominantly black precincts in Greensboro, Charlotte, Winston-Salem, and High Point from neighboring white precincts in those cities can only be related to that definition of "functional compactness" if it is assumed that African-Americans in those cities all have "like interests and needs," and that the persons in neighboring predominantly white precincts in those cities have different "interests and needs." Obviously, such logic relies on "racial stereotyping," which the Court denounced in *Shaw I*.

The Section 5 submission (*see* App. at 64a) and the affidavits of Senator Cooper (*see id.* at 74a-75a) and

---

to receive independent emphasis in drawing the plan." J.S. at 22.

[32]Citing *Lawyer v. Department of Justice*, 117 S. Ct. 2186, 2195 (1997), appellants assert that a contested district's lack of compactness does not necessarily prove a predominantly racial motive. In that case, however, the challenged legislative district's shape did not "stand out as different from numerous other Florida House and Senate districts." *Id.* In North Carolina, on the other hand, District 12 is significantly less compact than the state's other congressional districts.

[33]Previously, in seeking to justify race-based District 12 under the 1992 plan, the same counsel for the State minimized "geographic compactness" and relied on "functional compactness." *See* State Appellees' Brief in *Shaw II*, at 21-22. In their view "to a large extent, compactness is in the eye of the beholder." Tr. of Argument at 26. This premise, while ignoring the statistical measures of "compactness," provides appellants a tool for concealing the actual racial motive.

Representative McMahan (*see id.* at 83a) also assert that maintaining the 6-6 "partisan balance" in the North Carolina congressional delegation was a primary goal of the General Assembly. Senator Cooper claims that the Twelfth District's boundaries were based not on race but on partisan considerations and that the district was designed to be a "Democratic island in a largely Republican sea," with precincts chosen for inclusion in the district on the basis of their percentages of Democratic voters. *See id.* at 77a.

The speciousness of this "partisan disguise" becomes evident when the facts of the 1997 plan and the demographics of districts neighboring District 12 are closely examined. A number of the predominantly black precincts in Mecklenburg County which were placed in the Twelfth District – precincts which also are predominantly Democratic – are directly adjacent to precincts that are predominantly white and Democratic. The predominantly white Democratic precincts, however, were placed in the neighboring Ninth District. If District 12 was created as a Democratic district, there is no reason why these precincts were excluded, especially in light of their voting performance in the 1990 U.S. Senate election in North Carolina. Democratic senatorial candidate Harvey Gantt, an African-American, received the majority of votes in these predominantly white precincts over incumbent Republican Senator Jesse Helms. For example, Precinct 10 of Mecklenburg County is predominantly white in population (89 percent), and is 63 percent Democratic. Seventy-three percent of the votes in Precinct 10 were cast for Gantt in 1990 – certainly a sound showing of support for an African-American candidate across racial and party lines. Precinct 21 of Mecklenburg County is 85 percent white, and 59 percent Democratic; and 60 percent of its voters chose Mr. Gantt. Precinct 38 gave 54 percent of its votes to Gantt, and is 52 percent Democratic, yet it too was excluded from District 12 – and its white population is 85 percent. All three precincts were

excluded from District 12 – apparently left to sink in the "Republican sea." Similar statistics prove the same situation exists in Forsyth and Guilford counties under the 1997 plan.[34] As the district court concluded, "The common thread woven throughout the districting process is that the border of District 12 meanders to include nearly all of the precincts with African-American population proportions of over forty percent which lie between Charlotte and Greensboro, inclusive." App. at 20a.

This Court recognized a similarly specious "partisan disguise" in the recent Texas redistricting litigation. There the State defendants argued, just as appellants do here, that the gerrymandered districts were drawn with political, not racial, motivations. This defense was rejected because "to the extent that race is used as a proxy for political characteristics, a racial stereotype requiring strict scrutiny is in operation." *Bush v. Vera*, 116 S. Ct. 1941, 1956 (1996). However, disregarding *Bush*, the General Assembly used race to achieve an intended result of having two African-American members of Congress – who would inevitably be Democrats.[35]

---

[34]In Forsyth County, Precinct 1408, which is 71% white, is two-thirds Democratic and cast three-fourths of its votes for Gantt in 1990, was excluded from District 12. Precinct 1422 – two-thirds white and three-fourths Democratic – cast three-fourths of its votes for Gantt yet was excluded. In Guilford County, Precinct 11, which is 80% white and 62% Democratic, gave 67% of its votes to Gantt but was excluded. Precincts 14 and 17, which are respectively 58% and 62% Democratic and 82% and 85% white, also granted overwhelming victories to Gantt; yet both were excluded from District 12.

[35]The circumstance that in North Carolina more than 95 percent of African-American registered voters are Democrats makes it easier to disguise the legislature's racial motivation. However, even appellants' own expert concluded that there exists "a substantial correlation between the path taken by the boundary of the Twelfth District and the racial composition of the residents of the precincts touching that boundary, the tendency being to include precincts within the district which have relatively high black representation." Peterson Aff. (App. at 87a).

Appellants have often claimed that the 1997 plan was based in part on "incumbency considerations," which in turn were closely related to maintaining the existing partisan balance. Allegedly, the twelve districts were drawn so that no incumbent from the 1992 election (which took place under an unconstitutional districting plan) was placed in the same district as another incumbent. *See* App. at 74a-75a. Moreover, the plan was drawn to include select groups of voters within or without certain districts in order to preserve the electoral chances of those incumbents.[36]

Protecting an unconstitutionally-elected incumbent is a questionable method of "correcting the condition which offends the Constitution," the purported goal of an equitable remedy. *Swann*, 402 U.S. at 16. This is especially true when, as here, it is apparent that the legislature used the race of voters placed in Districts 12 and 1 to achieve the intended result of having two African-American Representatives from North Carolina. Accepting the rationale of appellants' argument would permit the total negation of the Court's decisions in other cases involving racial gerrymandering; it signifies that a result obtained by racial gerrymandering can thereafter be perpetuated if the legislators recite that they wish to "protect incumbents" or "maintain partisan balance." Indeed, under appellants' logic the identical plan held unconstitutional in *Shaw II* could be reenacted on the grounds that it was no longer racially

---

[36]In a discussion on the House Floor on March 26, 1997, Rep. McMahan offered reasons why he believed District 12 would "stand a Court test." "1. Not a Majority/Minority District .... 2. Population in 12 has homogeneous interest – comprised of many citizens living in an urban setting. 3. Drawn to protect the Democratic incumbent." State's Section 5 submission, 97C-28F-4F(1), at 2. In a committee meeting the previous day, Rep. McMahan stated that District 12 "recognizes racial fairness and is friendly to our incumbents which we [Sen. Cooper and Rep. McMahan] both determined on the front end to be an important consideration in the process." 97C-28F-4E(4) at 1.

motivated but instead was politically motivated.[37]

Interestingly, in justifying the 1997 plan with its 46.67 percent black Twelfth District, appellants used the same justification of "partisan balance" and "maintaining incumbents" that they have used in attempting to justify the 1998 redistricting plan – which has a 35 percent African-American population, does not split all of its five counties, and is more geographically compact.[38] In short, the legislators now claim to be able to meet their "partisan objectives" with a district that is less racially-gerrymandered. This, in itself, is another indication that the 1997 plan was chosen instead of some other plan more consistent with traditional race-neutral districting principles because the 1997 plan gave more certainty of reaching the desired racial result.

IV. DISTRICT 12 IS SUBJECT TO STRICT SCRUTINY UNDER THE EQUAL PROTECTION CLAUSE.

In their jurisdictional statement, appellants state the "Questions Presented" in a misleading way.[39] Moreover, the

---

[37]As indicated in the Counterstatement, appellants have already displayed their adroitness in moving from one rationale to another, i.e., beginning in 1992 with a defense against the political gerrymandering suit that the plan was racially gerrymandered, and later seeking to justify the plan as having a political motivation. The numerous, oft-repeated contradictions and evasions on the part of appellants serve to impeach their affidavits and constitute implied admissions of the actual racial-based motive. *Cf.* Wigmore, *Evidence* §§ 1040, 1060 (1972 ed.).

[38]*See* Mem. Op. (App. at 178a-79a).

[39]Contrary to Question 1's implication, the "shape and racial demographics" of District 12 were not "standing alone." Those circumstances and many others – such as the state's evasive tactics over a seven-year period – lead any objective factfinder to the inevitable conclusion that a racial motive was paramount. Similarly, contrary to Question 3's implication, the Twelfth District was more than "slightly irregular," the concentration of African-Americans was much higher in District 12 and many of its precincts than in adjoining districts and precincts, and the district violated many of the race-neutral criteria which – intermittently – the state purported to be following.

jurisdictional statement erroneously intimates that the pronouncements of *Shaw I* and *Shaw II* are irrelevant to the 1997 version of District 12 because the population of that district was only 46.67 percent black – rather than majority-black. *See, e.g.*, Question 3, J.S. at I; 27.[40] However, the opinion of the Court in *Miller*, 515 U.S. at 916, speaks in terms of a "significant number" of persons being placed "within or without" a certain district because of their race. Clearly a "significant number" of African-Americans in Guilford and Forsyth counties – over 113,000 – were placed in the Twelfth District because of their race. Nothing in the Court's opinion in *Bush*, 517 U.S. at 962-63, suggests that strict scrutiny does not apply when a legislature neglects traditional districting criteria due to a predominantly racial motive, whether or not a district is majority-minority. Although appellants rely on *Lawyer*, 117 S. Ct. at 2191, 2195, the challenged district in that case – though not majority-minority – did not "stand out as different in shape" from other Florida districts, and the plaintiffs' circumstantial evidence was insufficient to prove a predominantly racial motive.

In the present case, the evidence of the legislature's disregard of traditional districting principles is overwhelming, and the district court properly concluded that there was no

---

[40]In drawing the Twelfth District, the legislators also labored under the false impression that *Shaw*'s indictment of racial gerrymanders applied only to majority-minority districts. *See, e.g.*, Comments of Rep. McMahan, *supra* n.35; *see also* Comments of Sen. Cooper during Senate Floor Debate of March 27, 1997 ("*[T]he test outlined in Shaw vs. Hunt will not even be triggered because [District 12] is not a majority minority district* and you won't even look at the shape of the district in considering whether it is constitutional") (97C-28F-4F(2), at 5) (emphasis added).

litigable issue as to whether this placement was primarily motivated by race.[41] It inevitably follows under *Shaw*, *Miller*, and *Bush* that the test of strict scrutiny must be applied.[42] In that event, District 12 fails the test and the 1997 plan is unconstitutional.

CONCLUSION

For the foregoing reasons, appellees respectfully request this Court to dismiss the appeal, or, in the alternative, to summarily affirm the decision of the court below.

Respectfully submitted,

MARTIN MCGEE
Williams, Boger, Grady, Davis & Tittle, P.A.

ROBINSON O. EVERETT*
Everett & Everett

Attorneys for the Appellees

August 26, 1998

**Counsel of Record*

---

[41]The district court had before it, *inter alia*, the declarations of Dr. Ron Weber, Dr. Tim O'Rourke, and other leading experts who explained why they readily concluded that race was the predominant motive for District 12. *See, e.g.*, P-A App. at 5a-7a.

[42]Admittedly, when strict scrutiny is applied, special rules may apply to a majority-black district, *see Thornburg v. Gingles*, and a majority-minority district may be created if there is a "geographically-compact" majority-minority population. 478 U.S. 30, 50-51 (1986). However, the appellants' assertion that strict scrutiny was improperly applied suggests that appellants have confused the *Gingles* preconditions with the requirements of *Shaw* and its progeny.

APPENDIX

TABLE OF CONTENTS

Shaw v. Hunt, CA 92-202-CIV-5-BR, Order of United States District Court for the Eastern District of North Carolina, October 16, 1997 ..... 1a

Excerpts from Defendants' Memorandum, July 22, 1998 . 3a

Excerpts from Declaration of Dr. Ronald E. Weber 5a

SHAW v. HUNT, CA 92-202-CIV-5-BR, ORDER OF UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

Civil Action No. 92-202-CIV-5-BR

RUTH O. SHAW, *et al.*, Plaintiffs,	)	
and	)	
JAMES ARTHUR "ART" POPE, *et al.*, Plaintiff-Intervenors,	)	
v.	)	ORDER
JAMES B. HUNT, JR., *et al.*, Defendants,	)	
and	)	
RALPH GINGLES, *et al.*, Defendant-Intervenors.	)	

Defendants' motion to consolidate *Cromartie v. Hunt* (No.4:96-CV-104-H) (E.D.N.C.) and *Daly v. High* (No.5:97-CV-750-BO) (E.D.N.C.) with the above-captioned matter is DENIED.

SHAW ORDER OF OCTOBER 16, 1997, CONT'D . . .

This 16 October 1997.

For the Court: /s/ W. Earl Britt
United States District Judge

DEFENDANTS' MEMORANDUM, JULY 22, 1998

[Caption omitted in printing]

DEFENDANTS' MEMORANDUM IN SUPPORT OF CONSOLIDATION

Defendants have moved the Court pursuant to Federal Rule of Civil Procedure 42(a), to consolidate for purposes of trial the case of *Daly v. Leake*, No. 5:97-CV-750-BO(3), with the case of *Cromartie v. Hunt*, No. 4:96-CV-104-BO(3). Consolidation of these cases is appropriate because the actions involve common questions of law and fact; in addition, consolidation will avoid the risk of inconsistent adjudications and limit the burden on parties, witnesses and available judicial resources posed by separate trials.

FACTS

The *Daly* litigation involves an equal protection challenge to various North Carolina State House and State Senate Districts,[1] as well as Congressional Districts 1 and 3, as unconstitutional racial gerrymanders. Similarly, the *Cromartie* litigation involves an equal protection challenge to Congressional District 1 as an unconstitutional racial gerrymander.[2] Both of these cases are currently pending

---

[1] *Daly* plaintiffs are challenging House Districts 7, 28, 79, 87, 97 and 98, and Senate Districts 4, 6, 7, 38, and 39.

[2] *Cromartie* includes a challenge to Congressional District 12 in the State's 1997 congressional plan, Section 2 of Chapter 11 of the 1997 Session Laws. However, the challenge to District 12 has been rendered moot by the judgment of this Court declaring District 12 unconstitutional and the permanent injunction requiring the State to enact a new congressional plan, Chapter 2 of the 1998 Sessions Laws [*sic*] (the 1998 plan), which substantially modified the boundaries of District 12. *Daly* also includes challenges to Congressional Districts 5, 6, 9 and 12 in the 1997 congressional plan. These challenges have been rendered moot by the

DEFENDANTS' MEMORANDUM, JULY 22, 1998, CONT'D . . .

before the same three-judge panel.

* * * *

This the 22nd day of July, 1998.

MICHAEL F. EASLEY
ATTORNEY GENERAL

/s/ Edwin M. Speas, Jr.
Chief Deputy Attorney General
N.C. State Bar No. 4112

/s/ Tiare B. Smiley
Special Deputy Attorney General
N.C. State Bar No. 7119

N.C. Department of Justice
P.O. Box 629
Raleigh, N.C. 27602
(919) 716-6900

---

enactment of the 1998 congressional plan which substantially modified the boundaries of these four districts. Neither the *Cromartie* or *Daly* plaintiffs have amended their complaints to challenge District 12 in the 1998 plan. Because Districts 1 and 3 were re-enacted in the 1998 legislation with no modifications to their boundaries, these claims by the *Cromartie* and *Daly* plaintiffs are not moot.

DECLARATION OF DR. RONALD E. WEBER

[Caption omitted in printing]

* * * *

38. To sum up my conclusions about the predominant use of race and the subordination of race-neutral traditional districting principles to race by the state of North Carolina in the creation of the Congressional districts in 1997, I find that a significant number of persons are assigned to districts in eastern North Carolina and the Piedmont Region based on race. I conclude that race was a predominant factor in the construction of Districts 1, 3, 9, and 12. To a lesser extent race also affected the drawing of Districts 5, 6, and 10 in that certain counties in those districts were split on a racial basis. I also conclude that race-neutral traditional districting principles were subordinated in the creation of these districts. The state of North Carolina did not adhere to compactness in creating the districts, more counties, cities, and towns were split than needed in constructing the districts, and community of interest regions were not followed in the design of the districts. I found districts 3, 9, and 12 to be only technically contiguous, and that those three districts were not functionally contiguous.

III. NUMEROSITY AND CONCENTRATION OF AFRICAN-AMERICAN VOTERS

39. I conclude that the African-American voting age population in no part of North Carolina is sufficiently numerous or geographically compact enough to be a majority of voters using traditional districting principles to draw a single-member Congressional district. An equitably populated Congressional district in North Carolina needs a total population of about 552,386 persons using 1990 Census of Population data. First, an examination of maps and statistical data at the county, city, and precinct levels by race indicates that there are is [*sic*] only one

DECLARATION OF DR. RONALD E. WEBER, CONT'D . . .

potential area where one might locate enough African-American persons of voting age to create a geographically compact district. The area is in the northeastern part of the state located primarily among the counties of the Inner Coastal Plain region.

* * * *

CONCLUSION

46. On the basis of my above analysis, I conclude:
(1) that race was the predominant factor used by the state of North Carolina to draw the boundaries of the 1997 U.S. Congressional districts;
(2) that the state of North Carolina in creating the 1997 U.S. Congressional districting plan subordinated traditional race-neutral districting principles, such as compactness, contiguity, respect for political subdivisions or communities defined by actual shared interests, to racial considerations;
(3) that the African-American voting age population in North Carolina (particularly the northeastern part of the state) is not sufficiently large nor geographically concentrated enough to constitute a potential voter majority using traditional districting principles to draw a single-member Congressional district;
(4) that the majority-minority U.S. Congressional Districts 1 and 12 in the 1997 North Carolina plan is overly safe from the standpoint of giving a candidate of choice of African-American voters an opportunity to be elected, thus questioning whether the plan was narrowly tailored to satisfy a compelling state interest.

I declare under the penalty of perjury that the foregoing

DECLARATION OF DR. RONALD E. WEBER, CONT'D . . .

is true and correct.

Executed on this twenty third day of March, 1998.

/s/ Ronald E. Weber, Ph.D.

FILED
SEP 18 1998
OFFICE OF THE CLERK
SUPREME COURT, U.S.

(3)

No. 98-85

In the

Supreme Court of the United States

October Term, 1997

JAMES B. HUNT, JR., in his official capacity as Governor of the State of North Carolina, *et al.*,

Appellants,

v.

MARTIN CROMARTIE, *et al.*,

Appellees.

On Appeal from the United States District Court
Eastern District of North Carolina

APPELLANTS' REPLY IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM

MICHAEL F. EASLEY
North Carolina Attorney General

Edwin M. Speas, Jr.*, Chief Deputy Attorney General
Tiare B. Smiley, Special Deputy Attorney General
Melissa L. Saunders, Special Counsel to Attorney General

North Carolina Department of Justice
Post Office Box 629
Raleigh, North Carolina 27602-0629
Telephone: (919) 716-6900

**Counsel of Record*

6 pp

APPELLANTS' REPLY IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM

In their motion to dismiss or affirm, appellees make two jurisdictional arguments. First, they contend that this appeal should be dismissed because the parties' dispute over the constitutionality of the 1997 plan has been mooted by events. Second, they contend that appellants are not entitled to seek this Court's review of the district court's ruling against them on the issue of claim preclusion, because they did not raise that defense specially in their answer. These arguments are patently without merit and deserve only brief response.

I. THIS APPEAL IS NOT MOOT.

The North Carolina legislature's passage of the 1998 interim plan did not moot this appeal. This Court has consistently held that a state legislature's enactment of a temporary, contingent measure to replace a statute that a lower court has invalidated and enjoined it from enforcing, pending its appeal from the lower court's ruling, does not render that appeal moot. *See Zablocki v. Redhail*, 434 U.S. 374, 382 n.9 (1978); *Bullock v. Carter*, 405 U.S. 134, 141-42 n.17 (1972); *see also City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 288-89 & n.11 (1982) (city's repeal of challenged ordinance, after it was held invalid by district court, did not moot its appeal from the district court's ruling, where the city

had expressed its intent to re-enact the same provision if the district court's judgment were vacated on appeal).[1]

These principles are fully applicable in this case. The North Carolina legislature did not pass the 1998 plan voluntarily; it did so only in response to the district court's injunction forbidding it to conduct elections under the 1997 plan, the very injunction which is the subject of this appeal. It did so only after both the court below and this Court had denied its request for a stay of that injunction pending the outcome of this appeal. It specifically provided that the 1998 plan would expire of its own force if this appeal should result in the reversal of the district court's decision holding the 1997 plan unconstitutional, and the 1997 plan automatically would resume its effectiveness should that occur. Under these circumstances, the controversy between the parties over the constitutionality of the 1997 plan cannot fairly be said to be moot. To hold otherwise would be to leave a state that has its congressional redistricting plan wrongly invalidated by a trial court in an untenable position: if it wants to contest that ruling on appeal, it must decline the opportunity to enact an interim plan and allow the trial court to design one for it, thereby

---

[1] *Accord Hope Medical Group for Women v. Edwards*, 63 F.3d 418, 422-23 (5th Cir. 1995), *cert. denied*, 517 U.S. 1104 (1996); *Beare v. Briscoe*, 498 F.2d 244, 245-46 n.5 (5th Cir. 1974). *See generally* 13A CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE: JURISDICTION 2D § 3533.6, at 346-47 (3d ed. 1984) (statutory "changes adopted in response to a lower court ruling" will not moot an appeal from that ruling, if those changes "are made contingent on the outcome of [the appeal]").

ceding to the unelected federal judiciary -- for one or more election cycles -- its constitutional prerogative to design its own congressional districts. This Court should not require a state to pay such a price in order to obtain appellate review of a lower court decision invalidating its duly-enacted redistricting plan.

II. THE VALIDITY OF THE DISTRICT COURT'S RULING ON CLAIM PRECLUSION IS PROPERLY BEFORE THIS COURT.

This Court's jurisdiction to review the district court's ruling on the preclusion issue does not depend on whether appellants waived the preclusion defense by failing to raise it in a timely fashion.[2] Even when the parties have waived a preclusion defense, the trial court remains free to raise the defense *sua sponte*. *See Plaut v. Spendthrift Farms, Inc.*, 514 U.S. 211, 231 (1995) ("trial courts may in appropriate cases raise the res judicata bar on their own motion," even if the parties have waived it).[3] That is precisely what the trial court

---

[2] Appellants did not waive the preclusion defense. While they did not specifically mention the term "preclusion" in their answer, the preclusion defense was fairly subsumed within their third affirmative defense: failure to state a claim upon which relief can be granted. In addition, the defense was specifically raised -- and vigorously pressed -- by a group of would-be defendant-intervenors.

[3] *Accord Salahuddin v. Jones*, 992 F.2d 447, 449 (2d Cir.), *cert. denied*, 510 U.S. 902 (1993); *Hawkins v. Risley*, 984 F.2d 321, 324 (9th Cir. 1993); *McClain v. Apodaca*, 793 F.2d 1031, 1032-33 (9th Cir. 1986) (same). *See generally* 18 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 131.51 (3d. ed. 1998).

did here: it raised the issue of claim preclusion *sua sponte* in the March 31, 1998 hearing on the cross-motions for summary judgment. After affording the parties a full and fair opportunity to be heard on the issue, the court then ruled specifically -- and wrongly -- that the claims asserted here were not barred by the final judgment entered by the three-judge panel on remand in the *Shaw* case.[4] Because the court below actually considered and resolved the preclusion issue, the validity of that ruling is properly before this Court on appeal, even if appellants failed to raise the preclusion defense in a timely manner below. *Cf. Orr v. Orr*, 440 U.S. 268, 274-75 (1979) (When a state court assumes that a federal question is properly before it and proceeds to consider and resolve that question, this Court's jurisdiction to review the resulting ruling does not depend on whether the parties themselves properly raised the question in the state court proceedings.); *Payton v. New York*, 445 U.S. 573, 582 n.19 (1980) (same); *Raley v. Ohio*, 360 U.S. 423, 436 (1959) (same).[5]

---

[4] *See* App. 3a-4a (Memorandum Opinion of April 14, 1998) ("Although it was a final order, the September 12, 1997 decision of the *Shaw* three-judge panel was not preclusive of the instant cause of action, as the panel was not presented with a continuing challenge to the redistricting plan."). The court went on to explain the reason it had reached this conclusion in a lengthy footnote. *See* App. 4a n.1.

[5] That the court below went on to address the merits of the precluded claims is no reason for this Court to condone its blatant disregard of settled rules of preclusion law. To the contrary, if this Court does not reverse the district court's ruling on the preclusion issue, it will encourage courts in future cases not to take the preclusion doctrines seriously, which will lead to a much greater waste of judicial resources than would be occasioned by reversal here.

CONCLUSION

This appeal is not moot, and the preclusion issue is properly before this Court. For the reasons given in the jurisdictional statement appellants filed on July 6, 1998, this Court should either summarily reverse the April 6, 1998 judgment of the district court or note probable jurisdiction of this appeal.

Respectfully submitted,

MICHAEL F. EASLEY
North Carolina Attorney General

Edwin M. Speas, Jr.*
Chief Deputy Attorney General

Tiare B. Smiley
Special Deputy Attorney General

Melissa Saunders
Special Counsel to Attorney General

September 1998

*Counsel of Record

No. 98-85 (14)

Supreme Court, U.S.
FILED
NOV 12 1998
CLERK

In the

Supreme Court of the Unite

October Term, 1998

JAMES B. HUNT, JR., *et al.*,

Appellants,

and

ALFRED SMALLWOOD, *et al.*,

Intervenor-appellants,

v.

MARTIN CROMARTIE, *et al.*,

Appellees.

On Appeal from the United States District Court
Eastern District of North Carolina

JOINT APPENDIX

MICHAEL F. EASLEY
NC Attorney General

Edwin M. Speas, Jr.*
Tiare B. Smiley
Melissa L. Saunders
NC Department of Justice
Post Office Box 629
Raleigh, NC 27602-0629
Telephone: (919) 716-6900

Counsel for Appellants

Robinson O. Everett*
Everett & Everett
Post Office Box 586
Durham, NC 27702
Telephone: (919) 682-5691
Martin B. McGee
Williams, Boger, Grady,
Davis & Tuttle, P.A.
Post Office Box 810
Concord, NC 28026-0810
Telephone: (704) 782-1173

Counsel for Appellees

Adam Stein
Ferguson Stein Wallas
Adkins Gresham & Sumter
312 W. Franklin Street
Chapel Hill, NC 27514
Telephone: (919) 933-5300

Todd Cox*
NAACP Legal Defense &
Educational Fund, Inc.
1444 I Street NW
Washington, DC 20005
Telephone: (202) 682-1300

Counsel for Intervenor-appellants

*Counsel of Record

Appeal docketed July 16, 1998
Probable Jurisdiction noted September 29, 1998

311 PP

TABLE OF CONTENTS

Chronological Listing of Relevant Docket Entries 1

Amended Complaint and Motion for Preliminary Injunction 7

Defendants' Answer to Amended Complaint 25

Plaintiffs' Motion for Preliminary Injunction 35

Plaintiffs' Motion for Summary Judgment 41

Affidavit of Lee Mortimer (without attachments or tables) (CD 34) 47

Affidavit of John Weatherly (CD 34) 71

Affidavit of J. H. Froelich, Jr. (CD 34) 77

Affidavit of R.O. Everett (CD 34) 81

Defendants' Cross-Motion for Summary Judgment 85

Selected Portions and Attachments from the Section 5 Submission as filed with the court with the Affidavit of Gary O. Bartlett (CD 46):

- Section 97C-27N of the Section 5 Submission Commentary - Effect of Change on Minority Voters ..... J.S. App.63a*

- ¶ 97C-27R - Other Material Concerning the Purpose of the Plan 89

- Attachment 97C-27A-2, 97 House/Senate Plan A Statistical Printouts, pp. 25-28:
  i. District Summary - Total Populations
  ii. District Summary - Voting Age Populations
  iii. District Summary - Registration
  iv. District Summary - Elections 101

- Attachment 97C-27B-1, 1992 Congressional Base Plan #10 - Explanation/Statistics:
  i. District Summary - Total Populations
  ii. District Summary - Voting Age Populations
  iii. District Summary - Registration 111

- Attachment 97C-28F-4F(1), Statement of Representative Edwin McMahan, House Congressional Redistricting Committee. Discussion House Floor March 26, 1997. pp. 1-4 119

- Attachment 97C-28F-4F(2), Statement of Senator Roy Cooper, Verbatim Transcript of Floor Debate on HB 586 (Committee Substitute) Congressional Redistricting. Senate Chamber Thursday, March 27, 1997. pp. 1-8 127

Affidavit of Senator Roy A. Cooper, III (without attachments) (CD 47) ..... J.S. App. 69a*

Affidavit of Representative W. Edwin McMahan (without attachment) (CD 47) ..... J.S. App. 79a*

Affidavit of David W. Peterson, PhD (without attachment) (CD 47) ..... J.S. App. 85a*

Affidavit of Dr. Alfred W. Stuart (without attachments) (CD 47) ..... J.S. App. 101a*

"An Evaluation of North Carolina's 1998 Congressional Districts" by Professor Gerald R. Webster (without maps) (CD 47) J.S. App. 107a*

Defendants' Motion to Strike Affidavits filed in Support of Plaintiffs' Motion for Summary Judgment and Memorandum in Support of Motion 137

Affidavit of Robinson O. Everett (without attachment) (CD 56) 157

Declaration for Dr. Ronald E. Weber (without attachments) (CD 57) 159

Affidavit of Thomas A. Darling (without attachments) (CD 58) 221

Affidavit of Carmen Circincione (without attachments) (CD 59) 231

Affidavit of Timothy G. O'Rourke (without attachments) (CD 60) 241

Affidavit of Martin B. McGee (with all attachments except maps (Exhibits M, N, O & P which were lodged with the Court on August 27, 1998 as Maps 1. 2. 3 & 4)) (CD 61) 253

Plaintiffs' Conditional Motion to Strike the Affidavits of Roy Cooper, III and Edwin McMahan 291

Amended Answer of Defendant Intervenors 293

Order and Permanent Injunction of United States District Court for the Eastern District of North Carolina, April 3, 1998 ..... J. S. App. 45a*

Judgment of United States District Court for the Eastern District of North Carolina, April 6, 1998 ..... J.S. App. 49a*

Notice of Appeal, April 6, 1998 ..... J.S. App. 47a*

Amended Notice of Appeal, April 8, 1998 .. J.S. App. 51a*

Opinions of the U.S. District Court for the Eastern District of North Carolina, April 14, 1998 ..... J.S. App. 1a & 25a*

Order of United States District Court for the Eastern District of North Carolina, April 21, 1998 ..... J.S. App. 55a*

Order of the United States District Court for the Eastern District of North Carolina, June 22, 1998 ..... J.S. App. 175a*

Session Law 1997-11 and Session Law 1998-2 were lodged with the Court on August 26, 1998 ..... n/a

CD = Civil Docket Number

* Designates that the document was previously provided in the appendix to the Jurisdictional Statement, docketed on July 16, 1998. The page reference to the Jurisdictional Statement appendix is provided.

[This page intentionally left blank]

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

July 3, 1996 - Complaint filed

July 12, 1996 - Motion with memorandum by Smallwood, Ward, Moore, Waddle and Hodges to intervene as defendants

August 27, 1996 - Plaintiffs' motion to stay action

September 4, 1996 - Order granting motion to stay

April 8, 1997 - Plaintiffs' motion to extend stay

April 18, 1997 - Order granting motion to extend stay

June 2, 1997 - Plaintiffs' unopposed motion to extend stay

June 11, 1997 - Order granting motion to extend stay

August 11, 1997 - Plaintiffs' unopposed motion for further extension of stay

August 19, 1997 - Order granting motion for further extension of stay

October 10, 1997 - Plaintiffs' motion to dissolve stay

October 17, 1997 - Order granting motion to dissolve stay

October 17, 1997 - Amended complaint filed

October 17, 1997 - Notice of voluntary dismissal by plaintiff Weeks

November 25, 1997 - Defendants file answer to amended complaint

November 26, 1997 - Motion with memorandum by Smallwood, Moore, Hodges, Davis, Valder, Offerman, Newell, Lambeth and Simkins to intervene as defendants

December 22, 1997 - Plaintiffs' motion to amend complaint

January 23, 1998 - Designation of Three-Judge Court

January 30, 1998 - Plaintiffs' motion for preliminary injunction

RELEVANT DOCKET ENTRIES, CONTINUED . . .

February 5, 1998 - Plaintiffs' motion for summary judgment with memorandum and affidavits of Mortimer, Weatherley, Froelich and Everett

February 10, 1998 - Defendants' motion to strike preliminary injunction motion for lack of supporting memorandum

February 17, 1998 - Plaintiffs' response to motion to strike

February 18, 1998 - Defendants' reply to plaintiffs' response to motion to strike

February 20, 1998 - Notice of motion hearing for March 16, 1998 re: motion for preliminary injunction

February 23, 1998 - Plaintiffs' memorandum in support of motion for preliminary injunction

February 25, 1998 - Defendants' motion to consolidate preliminary injunction hearing with hearing on cross-motions for summary judgment

February 27, 1998 - Clerk notation that counsel had been called and told that it was anticipated that the March 11, 1998 deadline would be enforced unless otherwise notified by the court

March 2, 1998 - Movant - defendant intervenors' response to motion for summary judgment and memorandum

March 2, 1998 - Defendants' motion for summary judgment and memorandum

March 2, 1998 - Defendants' response to motion for summary judgment

RELEVANT DOCKET ENTRIES, CONTINUED . . .

March 2, 1998 - Defendants' affidavit of Bartlett in support of motion for summary judgment and in response to motion for summary judgment

March 2, 1998 - Defendants' affidavits of Cooper, McMahan, Goldfield, Peterson, Stuart and Webster in support of motion for summary judgment

March 2, 1998 - Defendants' motion with memorandum in support to strike affidavits of Everett, Froelich, Williams, Weatherley and Mortimer

March 5, 1998 - Plaintiffs' motion to continue preliminary injunction hearing and time for filing materials

March 10, 1998 - Clerk notation that counsel had been called and told that the court could not come together on Monday, but the judges would reestablish a hearing date and plaintiffs have until March 23, 1998 to file briefs.

March 19, 1998 - Order granting motion to continue preliminary injunction and time for filing

March 20, 1998 - Defendants' response to motion for preliminary injunction with supporting affidavits of Jones, Myrick, Taylor, Clayton, Etheridge, Price and Bartlett

March 23, 1998 - Movant defendant-intervenors' response to motion for preliminary injunction

March 23, 1998 - Plaintiffs' response to motion to strike affidavits of Everett, Froelich, Williams, Weatherley and Mortimer

March 23, 1998 - Plaintiffs' response to motion for summary judgment

RELEVANT DOCKET ENTRIES, CONTINUED . . .

March 23, 1998 - Plaintiffs' supplemental memorandum in support of motion for summary judgment and motion for preliminary injunction

March 23, 1998 - Plaintiffs' declaration of Weber and affidavits of Everett, Darling, Cirincione, O'Rourke and McGee in support of motion response, motion for summary judgment and motion for preliminary injunction

March 23, 1998 - Plaintiffs' motion to strike affidavits of Cooper and McMahan

March 23, 1998 - Plaintiffs' motion for judicial notice of computer data

March 27, 1998 - Defendants' response to plaintiffs' motion for judicial notice of computer data

March 31, 1998 - Hearing: motions for summary judgment and motion for preliminary injunction

March 31, 1998 - Notice of appearance by Cox, Hodgkiss and Stein for movant defendant-intervenors

March 31, 1998 - Subsequently decided authority pursuant to LR 4.07 by defendants

April 3, 1998 - Order granting plaintiffs' motion for summary judgment as to twelfth congressional district, granting preliminary injunction and granting permanent injunction

April 6, 1998 - Judgment for plaintiffs

April 6, 1998 - Defendants' motion for stay of April 3 court order

April 6, 1998 - Order denying stay

April 6, 1998 - Defendants' notice of appeal filed

April 8, 1998 - Defendants' amended notice of appeal filed

RELEVANT DOCKET ENTRIES, CONTINUED . . .

April 14, 1998 - Findings of fact and conclusions of law re: April 3, 1998 order filed and order denying plaintiffs' motion for summary judgment as to first congressional district

April 14, 1998 - Judgment re: first congressional district

April 17, 1998 - Defendants' motion with supporting memorandum for reconsideration of order denying stay and to shorten time for plaintiffs' response

April 20, 1998 - Plaintiffs' response to defendants' motion for reconsideration of order denying stay and motion to shorten time for plaintiffs' response

April 21, 1998 - Order denying motion for reconsideration of order denying stay, mooting motion to shorten time for plaintiffs to respond

April 21, 1998 - Order on scheduling

May 22, 1998 - Submission of 1998 congressional redistricting plan filed by defendants

May 26, 1998 - Renewed motion with memorandum by Smallwood, Moore, Hodges, Davis, Valder, Offerman, Newell, Lambeth and Simkins to intervene as defendants

May 27, 1998 - Defendants' response to motion to intervene as defendants

May 27, 1998 - Plaintiffs' response in opposition to revised 1998 redistricting plan

June 1, 1998 - Defendants' response in support of 1998 redistricting submission and in opposition to plaintiffs' objections

RELEVANT DOCKET ENTRIES, CONTINUED . . .

June 1, 1998 - Defendants' affidavits of Cooper, McMahan, Cohen and Bartlett (3rd) in support of memorandum in support of 1998 redistricting plan

June 22, 1998 - Order granting motion to intervene as defendants (Smallwood, Moore, Hodges, Davis, Valder, Offerman, Newell, Lambeth and Simkins)

June 22, 1998 - Order directing that 1998 congressional elections proceed as scheduled in court's April 21, 1998 order and the matter to proceed with discovery and trial with parties ordered to submit discovery schedules by June 30

July 17, 1998 - Plaintiffs' notice of appeal filed

AMENDED COMPLAINT AND MOTION FOR PRELIMINARY INJUNCTION

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
RALEIGH DIVISION
Civil Action No. 4.96-CV- 1 04

MARTIN CROMARTIE, THOMAS CHANDLER MUSE, R.O. EVERETT, J.H. FROELICH, JAMES RONALD LINVILLE, and SUSAN HARDAWAY,
Plaintiffs,

vs.

JAMES B. HUNT, JR., in his official capacity as Governor of the State of North Carolina, DENNIS WICKER in his official capacity as Lieutenant Governor of the State of North Carolina, HAROLD BRUBAKER in his official capacity as Speaker of the North Carolina House of Representatives, ELAINE MARSHALL in her official capacity as Secretary of State of North Carolina, and LARRY LEAKE, S. KATHERINE BURNETTE, FAIGER BLACKWELL, DOROTHY PRESSER and JUNE YOUNGBLOOD in their capacity as the North Carolina Board of Elections,
Defendants.

AMENDED COMPLAINT AND MOTION FOR PRELIMINARY AND PERMANENT INJUNCTION

Pursuant to Federal Rule 15(a) of Civil Procedure, Plaintiffs file this Amended Complaint and. complaining of the Defendants, allege:

PRELIMINARY STATEMENT

This action challenges the constitutionality of the racially gerrymandered congressional redistricting plan which was enacted by the North Carolina General Assembly in late March 1997. The Plaintiffs' claim is grounded on the injury to Plaintiffs which will result if elections are conducted under this recently enacted plan because it is racially motivated and is predicated on the unconstitutional race-based plan which preceded it. This plan, a fruit of the poisonous tree planted in January 1992 by its predecessor, injures and impairs the important rights of plaintiffs as citizens and registered voters of the State of North Carolina; and it threatens to continue to injure and impair those rights into the next century and millennium. The rights infringed by the acts of the State Defendants are those granted expressly or implicitly by Article 1, Sections 2 and 4 of the United States Constitution and by the Fourteenth and Fifteenth Amendments.

Plaintiffs seek a declaration that the redistricting plan enacted by the General Assembly in March 1997 is unconstitutional; that the Defendants be enjoined from using that plan in the 1998 elections or any subsequent congressional elections; that no one be allowed to serve in Congress if elected

under the March 1997 plan; that this Court direct the General Assembly to draw promptly a plan that is not tainted by the current plan and that is prepared without regard to race, party or incumbency. and that, if the Legislature fails to prepare promptly and enact such a plan and obtain preclearance for it, this Court do so.

THE PARTIES

1. Plaintiffs Martin Cromartie and Thomas Chandler Muse are citizens and residents of Edgecombe County. North Carolina; Plaintiff R.O. Everett is a citizen and resident of Rowan County, North Carolina, Plaintiff J.H. Froelich. Jr. is a citizen and resident of Guilford County, North Carolina; Plaintiff James Ronald Linville is a citizen and resident of Forsyth County, North Carolina; and Plaintiff Susan Hardaway is a citizen and resident of Mecklenburg County. North Carolina. All the Plaintiffs are registered voters.

2. Defendant James Hunt is the Governor in and for the State of North Carolina; and, in such capacity, he is the Chief Executive Officer of the State charged with the duty of enforcing compliance with State legislation enacted under Article II, Sec. 5(4) of the Constitution of North Carolina. Moreover. it is the Governor's duty to issue a commission to a person elected to the United States House of Representatives upon that person's production to the Governor of a certificate

of his or her election from the Secretary of State, pursuant to N.C.G.S. Section 163-194. He is sued in his official capacity.

3. Defendant Dennis Wicker is Lieutenant Governor of North Carolina, and, as part of his official duties, he presides over the North Carolina Senate and certifies certain actions of the Senate. He is sued in his official capacity.

4. Defendant Harold Brubaker is the Speaker of the North Carolina House of Representatives and, in this capacity, he presides over that body and certifies certain actions taken by the House of Representatives. He is sued in his official capacity.

5. Defendant Elaine Marshall, Secretary of State of North Carolina, is charged with preparing a certificate of election for each person elected after the Board of Elections certifies the result to her, pursuant to N.C.G.S. Section 163-193, and with recording the results of elections for the United States House of Representatives, pursuant to N.C.G.S. Section 163-195. She is sued in her official capacity.

6. The North Carolina State Board of Elections is an official agency of the State of North Carolina, which has been established to supervise and conduct elections in the State of North Carolina, including elections for the United States House of Representatives. Defendant Larry Leake is the chairman and S. Katherine Burnette, Faiger Blackwell, Dorothy

Presser and June Youngblood are members of the North Carolina State Board of Elections. All of these Defendants are charged with exercising the powers and duties of the State Board of Elections pursuant to N.C.G.S. Section 163-22. These Defendants are all sued in their official capacity.

JURISDICTION AND VENUE

7. This action arises under Article I, Sections 2 and 4 and the Fourteenth and Fifteenth Amendments of the Constitution of the United States and under 42 U.S.C. Sections 1983 and 1988, and 2 U.S.C. Section 2a.

8. This Court has original jurisdiction of this action pursuant to 28 U.S.C. Sections 1331, 1343(a)(3) and (4), and 2284.

9. Venue exists under 28 U.S.C. Section 1391(b) because the enactment of the unconstitutional race-based redistricting plan and the acts and events which are the subject of this action occurred principally in Raleigh, North Carolina in the Eastern District of North Carolina.

THREE-JUDGE DISTRICT COURT

10. Convocation of a three-judge district court is required by 28 U.S.C. Section 2284 because this action

challenges the constitutionality of the statewide apportionment of congressional districts for the State of North Carolina.

HISTORY OF THE CASE

11. Since it became a State when the United States Constitution was ratified, North Carolina has elected its Representatives to Congress from single-member congressional districts and the plans for these districts have been amended by the North Carolina General Assembly from time to time to reflect the results of the decennial censuses and the number of Representatives allocated to North Carolina.

12. As a result of the 1980 census, North Carolina was entitled to eleven Representatives in the Congress; and those Representatives were elected under a plan adopted by the General Assembly which provided for eleven districts.

13. As a result of the 1990 census, North Carolina became entitled to twelve Representatives in the Congress; and the General Assembly undertook to prepare a redistricting plan that would contain twelve districts and that would receive preclearance of the plan from the Department of Justice, which, under Section 5 of the Voting Rights Act, 42 U.S.C. Section 1973(b), had preclearance authority over forty North Carolina counties.

14. On July 9, 1991, the General Assembly enacted a redistricting plan which was predominantly motivated by race and contained a majority black district that was not compact or contiguous and did not conform to traditional redistricting principles.

15. Even though the 1991 plan enacted by the General Assembly was a racial gerrymander that sought to comply with unconstitutional requirements imposed by the Department of Justice under its preclearance authority, on December 18, 1991, the Civil Rights Division of the Department of Justice denied preclearance of that plan under Section 5 of the Voting Rights Act.

16. In January 1992, the General Assembly enacted a second redistricting plan, which also was predominately motivated by race. This plan had two bizarre majority-black districts, the First and the Twelfth. Neither of these districts was geographically compact or contiguous and the boundaries of each district defied traditional principles of redistricting.

17. Thereafter in March 1992, a lawsuit was commenced by five Durham voters against the Governor and various other State Defendants, in which those Plaintiffs attacked the constitutionality of the redistricting plan and especially the First and Twelfth Districts.

18. In that litigation, the Supreme Court held in the first appeal by those Plaintiffs that under the Equal Protection Clause of the Fourteenth Amendment they had stated a constitutional claim against the State Defendants in that action. See *Shaw v. Reno*, 509 U.S. 630 (1993).

19. On remand, various persons intervened in that case on the side of those Plaintiffs or on the side of the State Defendants, and a trial took place before a three-judge district court. In that trial the district court held unanimously that the redistricting plan was predominantly racially motivated, but ruled by divided vote that the plan survived the test of strict scrutiny. The Plaintiffs in that case appealed successfully to the Supreme Court, which held on June 13, 1996 that the Twelfth District was race-based and did not meet the test of strict scrutiny and therefore was an unconstitutional racial gerrymander. See *Shaw v. Hunt*, 116 S. Ct. 1894 (1996). The Supreme Court also held that neither the Plaintiffs nor the Plaintiff-intervenors in that action had standing to raise the issue of unconstitutionality of the First District, because none was a registered voter in that district. *Ibid.*

20. On July 3, 1996, two of the present Plaintiffs -- together with a third registered voter from Edgecombe County -- commenced the present action, in which they complained that the First District as it existed under the January 1992 plan was an unconstitutional racial gerrymander violating the Equal Protection Clause of the Fourteenth Amendment.

21. Subsequent proceedings were stayed in this action in order to await the outcome of any further proceedings in the *Shaw* litigation and thereafter to await possible legislative action by the General Assembly to replace with a new plan the unconstitutional racially gerrymandered redistricting plan enacted in January 1992.

22. Late in March 1997, the General Assembly enacted 97 House/Senate Plan A contained in Section 2 of Chapter 11 of the North Carolina General Assembly's 1997 Session Laws, a new plan which in various respects revised the First and Twelfth Districts as well as other districts.

23. As a result of the general elections conducted in November 1996 under the redistricting plan which in June 1996 the Supreme Court had ruled unconstitutional, six Democrats and six Republicans were elected to Congress and continue to serve there at the present time. One of the Democratic members of Congress, Melvin Watt, is an African-American elected from the racially gerrymandered Twelfth District and another, Eva Clayton, is an African-American elected from the racially-gerrymandered First District. Both of these Representatives were elected in 1992 pursuant to the intent of the General Assembly to assure that two African-Americans be elected to the Congress from North Carolina.

24. In devising and enacting this plan, the North Carolina General Assembly, in which the House of

Representatives was controlled by Republicans and the Senate by Democrats, intended to perpetuate the results of the November 1996 congressional elections that had been conducted under the unconstitutional plan enacted in January 1992.

25. To accomplish this result the General Assembly used as its starting point the unconstitutional plan of January 1992 under which the November 1996 election had been conducted. Under the 1992 plan, portions of Greensboro, High Point and Winston-Salem, the three cities of the Triad, were placed in the Twelfth District with parts of Charlotte, a different metropolitan area. This linkage, which was unprecedented and did not conform to traditional redistricting principles, was intended by the General Assembly to assure the reelection to Congress of an African-American, Melvin Watt. The First District was also created by the General Assembly in a manner contrary to traditional redistricting principles in order to assure the reelection to Congress of an African-American, Eva Clayton.

26. Acting with a predominantly racial motive, and acting under a court-imposed deadline, the General Assembly enacted in late March, 1997 a redistricting plan in which the Twelfth District was composed of parts of six counties. Each of those six counties was divided along racial lines and for a predominantly racial motive. Of Mecklenburg County's black population, 84% was placed in the Twelfth District and 16% in

the Ninth; but of its white population 27% was placed in the Twelfth District and 73% in the Ninth. Of Forsyth County's black population, 65% was placed in the Twelfth District and 35% in the Fifth District; but of its white population, 8% was placed in the Twelfth District and 92% in the Fifth. Of Guilford County's black population, 76% was placed in the Twelfth District and 24% in the Sixth; but of its white population, 25% was placed in the Twelfth District and 75% in the Sixth. Of Iredell County's black population, 63% was placed in the Twelfth District and 37% in the Tenth; but of its white population, 37% was placed in the Twelfth District and 63% in the Tenth. Of Rowan County's black population, 66% was placed in the Twelfth District and 34% in the Sixth; but of its white population, 23% was placed in the Twelfth District and 77% in the Sixth. Of Davidson County's black population 80% was placed in the Twelfth District and twenty percent 20% in the Sixth District; but of its white population, 49.6% was placed in the Twelfth District and 50.4% in the Sixth District. The Twelfth District is the only congressional district which under the March 1997 plan contains no county which is not divided.

27. Since 1793, Mecklenburg and Guilford Counties have never been in the same district until the unconstitutional race-based plan of January 1992 was enacted. Since its creation, Forsyth County had never been in the same congressional district with Mecklenburg County until 1992.

28. Under the March 1997 redistricting plan, the Twelfth District and First District have boundaries which were drawn pursuant to a predominantly racial motivation. Absent that predominantly racial motivation, those districts would have far different boundaries. Had the General Assembly never adopted its unconstitutional racially gerrymandered plans in July 1991 and January 1992, the March 1997 plan would have contained districts quite different from those in the March 1997 plan; and neither the Twelfth nor the First District would have its present form.

29. Because they result from and are caused by the predominantly racial motivation that gave rise to the January 1992 and July 1991 plans, the March 1997 plan is the fruit of those racially gerrymandered plans -- and is tainted by them.

CLAIM FOR RELIEF

30. The preceding allegations of this Complaint are incorporated herein by reference and realleged.

31. Plaintiffs Cromartie and Muse are registered voters in the new First District and each has standing to contest the March 1997 plan, which deprives them of their right to equal protection under the Fourteenth Amendment and abridges their rights as registered voters under the Fifteenth Amendment.

32. Plaintiffs Everett, Froelich, Linville and Hardaway are registered voters in the new Twelfth District and each has standing to contest the March 1997 redistricting plan, which deprives them of their right to equal protection under the Fourteenth Amendment and abridges their rights as registered voters under the Fifteenth Amendment.

33. The Plaintiffs, as citizens and residents of the State of North Carolina, are part of its "people;" and as registered voters in the State, they have, under Article 1, Section 2 of the United States Constitution a right to choose members of Congress in districts that are not race-based, either directly or indirectly.

34. The right of the Plaintiffs to vote for members of the House of Representatives is a right for which the Plaintiffs are entitled to the "equal protection of the laws," with respect to any action taken by the State of North Carolina. Moreover, this right to vote for members of the House of Representatives of the United States is a "privilege" of citizens of the United States within the meaning of the Fourteenth Amendment and is protected by that amendment from being abridged by the State of North Carolina. The right of the Plaintiffs as citizens of the United States to vote for members of the House of Representatives is also protected by the Fifteenth Amendment against being "abridged" by the State of North Carolina on account of the race or color of the Plaintiffs.

35. Any action by officers of the State of North Carolina which discriminates on the basis of race or color violates this right of Plaintiffs to vote for members of Congress; denies the Plaintiffs and all other voters equal protection of the laws; and on account of race or color abridges their right to vote.

36. The State Defendants shared an unconstitutional and racially discriminatory intent and purpose and pursuant to that intent they created congressional districts along racial lines with the purpose of assuring that two African-American representatives would be elected to Congress from North Carolina. In so acting, the General Assembly violated Plaintiffs' equal protection rights.

WHEREFORE, Plaintiffs respectfully pray that:

1. The United States District Court Judge to whom this case is initially assigned immediately notify the Chief Judge of the United States Court of Appeals for the Fourth Circuit so that a three-judge Court may be convened to hear this case in as expeditious a manner as feasible.

2. The Court declare the 1997 congressional redistricting plan to be unconstitutional and of no further force and effect insofar as it purports to establish congressional districts for the State of North Carolina.

3. The Court direct the General Assembly to prepare promptly a new redistricting plan for the State of North Carolina which will not be derived from any earlier unconstitutional plan and which will not concentrate in any congressional district persons of a particular race or color -- whether black, white, native American, or otherwise -- in a manner that is totally unrelated to considerations of compactness, contiguousness, and geographic or jurisdictional communities of interest; and if the General Assembly does not prepare promptly such a plan, then the Court itself prepare such a plan with the aid of suitable impartial experts.

4. The Court permanently enjoin the Defendants Leake, Burnette, Blackwell, Presser and Youngblood from conducting elections for the U.S. House of Representatives in North Carolina until the General Assembly enacts, and the Department of Justice preclears, a new redistricting plan as prayed for in Paragraph 3 above.

5. The Court enter both a temporary restraining order and preliminary injunction enjoining the Defendants Leake, Burnette, Blackwell, Presser and Youngblood from taking any action in preparation for primary or general elections for the U.S. House of Representatives in North Carolina until the General Assembly enacts and the Department of Justice preclears a new redistricting plan as prayed for in Paragraph 3 above.

AMENDED COMPLAINT, CONTINUED . . .

6. That for purposes of consideration of any injunctive relief this complaint, when properly verified, be treated as an affidavit in this action.

7. That the Court award cost and attorneys fees to the Plaintiffs as against the Defendants pursuant to the Equal Access To Justice Act 28 U.S.C. Section 2412 or as otherwise authorized by law.

8. That the Court grant such other and further relief as may, to the Court, seem just and proper.

AMENDED COMPLAINT, CONTINUED . . .

Respectfully submitted, this the 10th day of October 1997.

/s/ Robinson 0. Everett
Everett & Everett
N. C. State Bar No.: 13 8 5
As Attorney for the Plaintiffs
P.O. Box 586
Durham, NC 27702
Telephone: (919) 682-5691

Williams, Boger, Grady, Davis
& Tittle, P.A.

/s/ by: Martin B. McGee
State Bar No.: 22198
Attorneys for the Plaintiffs
P.O. Box 810
Concord, NC 28026-0810
Telephone: (704) 782-1173

[This page intentionally left blank]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
EASTERN DIVISION
Civil Action No. 4-96-CV-104-H2

MARTIN CROMARTIE, THOMAS CHANDLER MUSE, and GLENNES DODGE WEEKS,	)
Plaintiffs,	)
v.	)
JAMES B. HUNT, JR., in his official capacity as Governor of the State of North Carolina, *et al.*,	)
Defendants.	)

DEFENDANTS' ANSWER TO AMENDED COMPLAINT

Defendants, Governor James B. Hunt, *et al.* for their answer to plaintiffs' amended complaint, say and allege:

FIRST DEFENSE

PRELIMINARY STATEMENT

The allegations of plaintiffs' preliminary statement constitute legal contentions. To the extent an answer is required, the allegations are denied.

THE PARTIES

1. The allegations regarding the citizenship, residence and voter registration of the plaintiffs are admitted.

2. It is admitted that James B. Hunt, Jr. is the Governor of the State of North Carolina, sued in his official capacity, and that pursuant to Article III of the Constitution of North Carolina the executive power of the State is vested in the Governor and it is his duty to take care that the laws are faithfully executed. It is further admitted that pursuant to N.C. GEN. STAT. § 163-194, the Governor shall issue a commission attesting to a person's election as a member of the United States House of Representatives upon that person's production of a certificate of his or her election from the Secretary of State. Any remaining allegations in paragraph 2 are denied.

3. It is admitted that Dennis Wicker is the Lieutenant Governor of the State of North Carolina, sued in his official capacity, and that pursuant to Articles II and III of the Constitution of North Carolina, he is President of the Senate and performs such additional duties, including signing enacted legislation, as the General Assembly or the Governor may assign to him. Any remaining allegations in paragraph 3 are denied.

4. It is admitted that Harold Brubaker is the Speaker of the North Carolina House of Representatives, sued

in his official capacity, and performs duties, including signing enacted legislation, assigned to him by the House of Representatives. Any remaining allegations of paragraph 4 are denied.

5. The allegations of paragraph 5 are admitted.

6. The allegations of paragraph 6 are admitted.

JURISDICTION AND VENUE

7. It is admitted that plaintiffs rely upon the constitutional and statutory provisions cited in paragraph 7. Any remaining allegations are denied.

8. The allegations of paragraph 8 are admitted.

9. It is admitted that venue exists pursuant to 28 U.S.C. § 1319(b) in Raleigh, North Carolina in the United States District Court for the Eastern District of North Carolina, Western Division. Any remaining allegations in paragraph 9 are denied.

THREE-JUDGE COURT

10. The allegations of paragraph 10 are admitted.

HISTORY OF THE CASE

11. The allegations of paragraph 11 are admitted.

12. The allegations of paragraph 12 are admitted.

13. The allegations of paragraph 13 are admitted.

14. It is admitted that on July 9, 1991, the General Assembly enacted a congressional redistricting plan which included one majority African-American district. All remaining allegations of paragraph 14 are denied.

15. It is admitted that on December 18, 1991, the 1991 congressional plan was denied preclearance under § 5 of the Voting Rights Act by John R. Dunne, Assistant Attorney General, Civil Rights Division on behalf of the United States Attorney General. All remaining allegations of paragraph 15 are denied.

16. It is admitted that on January 24, 1992, the General Assembly enacted a second congressional redistricting plan which included two majority African-American districts. All remaining allegations of paragraph 16 are denied.

17. The allegations of paragraph 17 are admitted.

18. The allegations of paragraph 18 are legal contentions. To the extent an answer is required, the allegations are denied.

19. The allegations of paragraph 19 constitute legal contentions. To the extent an answer is required the courts' opinions speak for themselves and any remaining allegations are denied.

20. The allegations of paragraph 20 are admitted.

21. It is admitted that subsequent proceedings were stayed in this action pending the outcome of the proceedings in the *Shaw* litigation, including possible legislative action by the General Assembly to enact a new congressional redistricting plan to cure the constitutional defect held to exist in the 1992 plan. Any remaining allegations of paragraph 21 are denied.

22. The allegations of paragraph 22 are admitted.

23. It is admitted that general elections conducted in November 1996 under the plan ruled on by the Supreme Court in June 1996 resulted in the election of six Democrats and six Republicans to the United States House of Representatives and that these members continue to serve at the present time. It is further admitted that one of the Democrat members is Mel Watt, an African-American elected from the Twelfth District, and another Democrat member is Eva

Clayton, an African-American elected from the First District, and that both of these members were elected in these same districts in 1992. All remaining allegations of paragraph 23 are denied.

24. It is admitted that the North Carolina General Assembly, where the Republicans comprise a majority in the House of Representatives and the Democrats comprise a majority in the Senate, publicly stated that one of its goals in enacting a new congressional redistricting plan was to maintain the partisan balance of the State's congressional delegation which resulted from the 1996 elections and that the plan enacted by the General Assembly achieved that goal. All remaining allegations of paragraph 24 are denied.

25. It is admitted that in drawing a new congressional plan, the General Assembly publicly stated its goal to cure the constitutional defect identified by the Supreme Court in the 1992 plan and that the plan enacted by the General Assembly achieved that goal. It is further admitted that portions of the metropolitan areas of Charlotte, Greensboro, High Point and Winston-Salem were included in the Twelfth District in the 1992 plan. All remaining allegations of paragraph 25 are denied.

26. It is admitted that the General Assembly enacted a new Congressional redistricting plan on March 31, 1997, pursuant to a court-ordered deadline of April 1, 1997. It is

further admitted that the new Twelfth District includes parts of six counties and that the percentages of African-American and white populations in the counties and districts are approximately correct as stated. It is further admitted that the Twelfth District is the only congressional district in which all counties contained in the district have been divided between districts. All remaining allegations of paragraph 26 are denied.

27. From 1789 to 1792, Forsyth, Guilford and Mecklenburg counties were in the same congressional district and on numerous occassions after 1792 Forsyth and Guilford counties were in the same congressional district. However, it is admitted that from 1793 to 1992 Mecklenburg and Guildford Counties were never in the same congressional district and that from its creation until 1992 Forsyth County was never in the same congressional district as Mecklenburg County. Any remaining allegations of paragraph 27 are denied.

28. The allegations of paragraph 28 are denied.

29. The allegations of paragraph 28 are denied.

CLAIM FOR RELIEF

30. The preceding answers are incorporated by reference in answer to paragraph 30.

ANSWER, CONTINUED . . .

31. It is admitted that plaintiffs Cromartie and Muse are registered voters in the new First District. All remaining allegations are denied.

32. It is admitted that plaintiffs Everett, Froelich and Hardaway are registered voters in the new Twelfth District. All remaining allegations are denied.

33. The allegations of paragraph 33 are legal contentions. To the extent an answer is required, the allegations are denied.

34. The allegations of paragraph 33 are legal contentions. To the extent an answer is required, the allegations are denied.

35. The allegations of paragraph 33 are legal contentions. To the extent an answer is required, the allegations are denied.

36. The allegations of paragraph 36 are denied.

SECOND DEFENSE

Plaintiff Linville has standing to challenge neither the First nor Twelfth Districts.

ANSWER, CONTINUED . . .

THIRD DEFENSE

Plaintiffs have failed to state a claim for relief under the Fourteenth or Fifteenth Amendment.

FOURTH DEFENSE

The First and Twelth Congressional Districts are not racial gerrymanders.

FIFTH DEFENSE

The State has a compelling interest in complying with § 5 of the Voting Rights Act, as amended, 42 U.S.C. § 1973c.

SIXTH DEFENSE

The State has a compelling interest in complying with § 2 of the Voting Rights Act, as amended, 42 U.S.C. § 1973c.

SEVENTH DEFENSE

The State has a compelling interest in eradicating the effects of past racial discrimination.

EIGHTH DEFENSE

James B. Hunt, Dennis Wicker, Harold Brubaker and Elaine Marshall, sued in their official capacities, are not proper defendants to this action.

This the 25th day of November, 1997.

MICHAEL F. EASLEY
ATTORNEY GENERAL

/s/ Edwin M. Speas, Jr.
Senior Deputy Attorney General
N.C. State Bar No. 4112

/s/ Tiare B. Smiley
Special Deputy Attorney General
N. C. State Bar No. 7119

/s/ Norma S. Harrell
Special Deputy Attorney General
N.C. State Bar No. 6654
N.C. Department of Justice
P.O. Box 629
Raleigh, N.C. 27602
(919) 716-6900

[Certificate of Service omitted in printing]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
RALEIGH DIVISION
Civil Action No. 4:96-CV-104

MARTIN CROMARTIE, *et al.*, Plaintiffs,	)
vs.	)
JAMES B. HUNT, JR., in his official capacity as Governor of the State of North Carolina, *et al.*, Defendants.	)

MOTION FOR PRELIMINARY INJUNCTION

Pursuant to Rule 65 of the Federal Rules of Civil Procedure – and renewing the prayer for relief in their amended complaint – Plaintiffs move the Court for entry forthwith of a Preliminary Injunction prohibiting congressional elections from taking place under the current Congressional redistricting plan. In support of Plaintiffs' Motion, the Plaintiffs allege and state:

1. On July 9, 1991, the General Assembly enacted a congressional redistricting plan (the "First Plan") that created one of twelve congressional districts which was primarily based on race.

2. Even though the First Plan was itself a racial gerrymander, the Civil Rights Division of the Department of Justice, pursuant to its "maximization" policy, denied preclearance of that plan under Section 5 of the Voting Rights Act on December 18, 1991.

3. In January, 1992, the General Assembly enacted a second redistricting plan (the "Second Plan"), which was also predominately motivated by race. This plan had two bizarre majority-black districts, the First and the Twelfth, as well as other bizarre predominantly white districts. Neither of these districts was geographically compact or contiguous and the boundaries of each district defied traditional principles of redistricting.

4. Thereafter in March 1992, a lawsuit was commenced by five Durham voters against the Governor and various other State Defendants, in which those Plaintiffs attacked the constitutionality of the redistricting plan and especially the First and Twelfth Districts.

5. More than four years after the initiation of that litigation, acting on the Plaintiffs' second appeal to the United States Supreme Court, the

Court held on January 13, 1996 that the Twelfth District of the Second Plan was race-based and did not meet the test of strict scrutiny and therefore was an unconstitutional racial gerrymander. See Shaw v. Hunt 116 S.Ct. 1894 (1996). The Supreme Court also held that neither the Plaintiffs nor the Plaintiff-intervenors in that action had standing to raise the issue of unconstitutionality of the First District, because none was a registered voter in that district. Id.

6. Despite the Shaw Plaintiffs' motion to restrain the 1996 congressional elections from proceeding under the Second Plan, the elections were held for the third time under the plan that the Supreme Court had already declared to be unconstitutional.

7. Thus, at the end of the current session of Congress, North Carolina will have been served for six years by members of Congress who have been elected under an unconstitutional redistricting plan.

8. The Complaint in this action, which challenges the third congressional plan enacted by the General Assembly in March 1997 (the "Third

Plan") as unconstitutional, was filed July 3, 1996 and amended in October 1997.

9. In devising the Third Plan, the General Assembly used as its starting point the unconstitutional Second Plan of January 1992. In the Third Plan the boundaries of the Twelfth and First Districts are again predominantly motivated by race and cannot pass the strict scrutiny test.

10. The 1998 congressional elections are rapidly approaching and the filing period for the elections will close on February 2, 1998. Even though litigation challenging North Carolina's redistrict plans was first filed in March of 1992, the citizens of North Carolina face the possibility that they shall have to endure a fourth election and eight years of representation by persons elected in violation of the Constitution.

11. If injunctive relief is not granted by this Court, Plaintiffs will suffer irreparable injury of being represented by members of Congress elected under an unconstitutional plan which stigmatizes voters of all races.

12. In light of the recent history of the General Assembly's use of racial gerrymanders and their cosmetic attempt at remedying their unconstitutional Second Plan, Plaintiffs are likely to prevail on the merits.

WHEREFORE, Plaintiffs pray the Court:

1. That a preliminary injunction prohibiting congressional elections from taking place under the congressional redistricting plan enacted by the General Assembly in March 1997.

2. That Plaintiffs be granted such other relief as the Court deems appropriate.

/s/ Robinson O. Everett
Everett Law Firm
P.O. Box 586
Durham, NC 27702
Tel. No.: (919)-682-5691

Williams, Boger, Grady, Davis and
Tittle

/s/ by: Martin B. McGee
147 Union Street, South
P.O. Box 810
Concord, NC 28026-0810
Tel No.: (704)-782-1173
NC Bar No.: 22198

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
RALEIGH DIVISION

Civil Action No. 4.96-CV-104

MARTIN CROMARTIE, *et al.*,	)
Plaintiffs,	)
	)
vs.	)
	)
JAMES B. HUNT, JR., in his official capacity as Governor of the State of North Carolina, *et al.*,	)
Defendants.	)

MOTION FOR SUMMARY JUDGMENT

Pursuant to Federal Rules of Civil Procedure, Rule 56, Plaintiffs move for summary judgment and in support thereof they respectfully show the Court:

1. On June 13, 1996, the Supreme Court decided in *Shaw v. Hunt*, 116 S.Ct. 1894 (1996), that the North Carolina Congressional redistricting plan adopted in 1992 was an unconstitutional racial gerrymander and held that the five original plaintiffs in that action had standing to challenge the Twelfth District, where they resided, but had no standing to challenge the First District.

MOTION FOR SUMMARY JUDGMENT, CONTINUED . . .

2. A few days later, Plaintiffs Cromartie, Muse, and another Tarboro registered voter, instituted the present action which, attacked the First Congressional District, where they were registered voters.

3. Because the *Shaw* plaintiffs were seeking to have a new redistricting plan put into effect for the November 1996 election by the three-judge District Court in which that case was pending, the three original Plaintiffs in this action and agreed with the Defendants to enter into a consent decree which would stay proceedings in this action to await conclusion of the proceeding in *Shaw v. Hunt*.

4. In *Shaw*, the three-judge District Court declined to order that a new redistricting plan be put into effect for the November 1996 election, but did require the General Assembly to draw a new plan prior to April 1, 1997. Such a plan was ultimately enacted by the General Assembly late in March, 1997, and thereafter it was precleared by the Department of Justice and approved by the *Shaw* District Court.

5. Subsequently, the stay that had been entered by consent in this action was dissolved and an amended complaint was filed by Plaintiffs Cromartie and Muse, as registered voters in the "new" First District. They were joined as plaintiffs by four others who claim standing to attack the "new" Twelfth District.

MOTION FOR SUMMARY JUDGMENT, CONTINUED . . .

6. In their amended complaint, the Plaintiffs prayed that the Court declare unconstitutional the 1997 Congressional redistricting plan and enter an order which both temporarily and permanently would enjoin the conducting of elections according to the plan enacted by the General Assembly in 1997.

7. When first filed, this action was assigned to District Judge Malcolm Howard, but in January, 1998, a three-judge court was assigned to this case, pursuant to 28 U.S.C. Section 2284; and a motion for preliminary injunction has now been filed in the three-judge court to supplement the prayer for relief in the amended complaint.

8. Submitted herewith are the affidavits of Lee Mortimer, John Weatherly, Neil C. Williams, R.O. Everett and J.H. Froelich, Jr. As appears from these affidavits and from other evidence of which the Court may properly take judicial notice - such as maps of the current districting plan and of its predecessor plans - no dispute exists with respect to the material facts. These undisputed facts establish that the Congressional redistricting plan adopted by the North Carolina General Assembly in 1997 is itself a racial gerrymander and that both the Twelfth and First Districts under that plan have been drawn by the Legislature with a predominately racial motive and are tainted by being derived from the unconstitutional racially gerrymandered Twelfth and First Districts in the 1992 plan.

MOTION FOR SUMMARY JUDGMENT, CONTINUED . . .

9. The filing period for Congress, which commenced in early January, 1997, has already come to an end and there is urgency in obtaining a judicial determination as to the unconstitutionality of the current redistricting plan, and especially with respect to the racially gerrymandered Twelfth and First Districts, which have boundaries that are the result of a predominately racial purpose. In order to assure that the voters have a meaningful opportunity to vote for candidates of their choice in an election untainted by any racial gerrymander, it is imperative that the Court quickly determine the constitutionality of the present plan, and especially of the two districts where plaintiffs reside.

WHEREFORE, Plaintiffs respectfully move the Court to enter a summary judgment declaring that, in the 1992 redistricting plan, the First District - like the Twelfth - was an unconstitutional racial gerrymander, and also declaring that the Twelfth and First Congressional Districts under the 1997 plan are unconstitutionally gerrymandered; and enjoining the use of these districts and of the current redistricting plan in the 1998 Congressional election or in any future election.

MOTION FOR SUMMARY JUDGMENT, CONTINUED . . .

Respectfully submitted, this the 5th day of February, 1998.

/s/ Robinson O. Everett
Everett & Everett
N.C. State Bar No.: 1385
As Attorney for the Plaintiffs
P.O. Box 586
Durham, NC 27702
Telephone: (919)-682-5691

Williams, Boger, Grady, Davis
& Tittle, P.A.

/s/ by: Martin B. McGee
State Bar No.: 22198
Attorneys for the Plaintiffs
P.O. Box 810
Concord, NC 28026-0810
Telephone: (704)-782-1173

[This page intentionally left blank]

AFFIDAVIT OF LEE MORTIMER (WITHOUT ATTACHMENTS OR TABLES) (CD 34)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
EASTERN DIVISION
Civil Action No. 04-CV-104-H2

Martin Cromartie et al.	)
	)
v.	)
	)
James B. Hunt, Jr. in his capacity as governor	)

AFFIDAVIT OF LEE MORTIMER

LEE MORTIMER, being duly sworn, deposes and declares the following:

I live at 4116 Livingstone Place in Durham, North Carolina, and have resided in Durham for nine years and in North Carolina for 40 years. I am currently employed as a technical writer in Research Triangle Park, but from 1974-1980, I worked as a newspaper and broadcast journalist at the *High Point Enterprise* and other news organizations. I have a degree in history with a minor in political science from Western Carolina University.

During and after my journalism career, I have maintained a keen interest in politics and the political process, particularly issues relating to voting and representation, and have studied

these issues extensively. I have written a number of articles on those subjects, which have been published in many North Carolina newspapers, including African-American newspapers and other publications such as *The Journal of Common Sense*, the *Independent Weekly*, *The Beacon*, and *The Prism*.

I was appointed by Senate President Pro-Tem Marc Basnight to serve during 1996 on the General Assembly's Election Laws Reform Committee. This committee of 14 legislators and public members studied and recommended a range of election-related proposals, some of which were enacted. I proposed legislation, which three study committees recommended, to authorize local governments to adopt proportional voting methods. The committee's co-chair, Sen. Wib Gulley, and another member, Sen. Leslie Winner, subsequently served on the General Assembly's Senate Select Committee for Congressional Redistricting.

In April 1994, I was interviewed on National Public Radio (NPR) about a proposal I had designed for North Carolina Congressional elections using proportional voting. That proposal was subsequently publicized in the *New York Times*, the *New Yorker*, *Congressional Quarterly*, and *USA Today*. The Institute of Bill of Rights Law of the Marshall-Wythe School of Law at the College of William and Mary asked to include one of my articles in its Supreme Court Preview conference for journalists and lawyers held September 22-23, 1995.

I was asked by the plaintiffs in *Shaw v. Hunt* to provide expert testimony about congressional redistricting and representation issues. I was deposed by counsel for the defense and the plaintiffs on November 29, 1993. Then, as now, I have neither requested nor received a fee for my testimony.

The Appendix outlines my additional qualifications to provide expert testimony on the Congressional redistricting process in North Carolina. It also includes a partial listing of my articles. Except as otherwise noted, the opinions in my analysis are based on official data from the 1997 Congressional redistricting plan *(maps shown in Exhibit A)*, or from voting returns reported by the North Carolina Board of Elections. My analysis and conclusions follow.

I. RACE STILL PREDOMINATES IN 12TH AND 1ST DISTRICTS

In late March 1997, the North Carolina General Assembly enacted a new Congressional redistricting plan *(see Exhibit A)* to replace the previous plan, which the U.S. Supreme Court ruled had used unconstitutional racial gerrymandering in creating the 12th District. The Court found that race was "the predominant consideration" in drawing the 12th District, and that the 12th District did not meet the test of "strict scrutiny."

Although the 1st District was not directly ruled on by the Supreme Court, its severe misshapenness was cited in the Court's majority opinion. That severe misshapenness, in my

opinion, indicates that race had predominated in determining the 1st District's boundaries. Sen. Roy Cooper, the chairman of the Senate Redistricting Committee, gave the same assessment in a meeting with Congressional incumbents — saying that if the former 1st District were challenged, it would be declared unconstitutional.[1]

Both districts were redrawn in the 1997 redistricting plan, but it is clear from their resemblance to the previous districts that the redrawn districts are the "fruit of the poisonous tree," and so, in my opinion, are irreparably tainted. I believe the new 12th District and 1st District would never have been drawn with their present boundaries — except for race.

New Twelfth District — The new district subordinates to race all traditional redistricting principles, such as compactness and respect for county and municipal boundaries. I can see no legitimate basis for the way disparate and geographically dispersed minority communities were grouped together. The new 12th District is, in my opinion, simply a makeover of the old unconstitutional district.

New First District — Like the old 1st District from which it derives, the new 1st District is not narrowly tailored to meet a compelling state interest. The number of counties that are divided and the failure to produce a more geographically compact district demonstrate to me that the purpose was to classify and over-concentrate voters on the basis of race.

II. 12TH DISTRICT'S SINGLE-MINDED FOCUS ON RACE

The new 12th District was reduced from 10 counties and three metropolitan areas — to six counties and two metropolitan areas. Though now shorter and wider, it could only be called "less bizarre" in appearance than its unconstitutional predecessor. Strictly speaking, the new 12th District is no longer a "minority-majority" district — 47 percent of its population is black and 48 percent is "minority." However, I am not aware that any specific percentage of minority residents has been designated as a benchmark for determining whether a district is a racial gerrymander. I believe it is the process used to reach a result — rather than the result itself — that indicates racial intent. In the case of the new 12th District, the state's own data show unmistakably that voters were identified, classified, and assigned by race.

In my opinion, three principal indicators reveal a racial methodology that subordinated all other considerations to race in redrawing the 12th District.

Voters assigned by race — The 12th District is made up of parts of six counties. In each county, the maximum number of blacks and the minimum number of whites were identified and assigned to the 12th District *(see Table 1)*. In Mecklenburg County, 84 percent of all blacks in the county, but only 27 percent of all whites, were placed in the 12th District; while only 16 percent of all blacks, but 73 percent of all whites in the

county, were placed in the 9th District. In Guilford County, 76 percent of all blacks, but only 25 percent of all whites, were placed in the 12th District; while 24 percent of all blacks, but 75 percent of all whites, were placed in the 6th District. In Forsyth County, 65 percent of all blacks, but only 8 percent of all whites, were placed in the 12th District; while 35 percent of all blacks, but 92 percent of all whites, were placed in the 5th District.

Table 1 — 12th District Voters Assigned by Race

County	*Race*	*12th District*	*Other District*
Mecklenburg	**Black**	**84%**	**16%**
(12th & 9th)	*White*	*27%*	*73%*
Guilford	**Black**	**76%**	**24%**
(12th & 6th)	*White*	*25%*	*75%*
Forsyth	**Black**	**65%**	**35%**
(12th & 5th)	*White*	*8%*	*92%*
Davidson	**Black**	**80%**	**20%**
(12th & 6th)	*White*	*49.6%*	*50.4%*
Rowan	**Black**	**66%**	**34%**
(12th & 6th)	*White*	*23%*	*77%*
Iredell	**Black**	**63%**	**37%**
(12th & 10th)	*White*	*37%*	*63%*

Source: 1997 Redistricting Plan

The three urban cores drew a combined population of 413,794 (75 percent of the district total), leaving 138,249 (25 percent of the total) to be drawn from the three corridor counties. In

Davidson County, 80 percent of blacks and 49.6 percent of whites were placed in the 12th District, while 20 percent of blacks and 50.4 percent of whites were placed in the 6th District. In Rowan County, 66 percent of blacks and 23 percent of the whites were placed in the 12th District, while 34 percent of blacks and 77 percent of whites were placed in the 6th District. In Iredell County, 63 percent of blacks and 37 percent of the whites were placed in the 12th District; while 37 percent of blacks and 63 percent of whites were placed in the 10th District.

Table 2—Intact vs. Divided Counties

District	**Counties**	**# Intact**	**% Intact**	**% Divided**
First	20	10	50%	50%
Second	9	5	55%	45%
Third	18	11	61%	39%
Fourth	5	2	40%	60%
Fifth	9	7	78%	22%
Sixth	7	2	29%	71%
Seventh	9	6	67%	33%
Eighth	10	8	80%	20%
Ninth	3	2	67%	33%

Tenth	11	10	91%	9%
Eleventh	15	15	100%	0
Twelfth	6	0	0	100%
11 dists.	—	—	65%	35%
12 dists.	—	—	60%	40%

Source: 1997 Redistricting Plan

No intact counties — According to news media reports and legislative statements, the General Assembly had as one major redistricting objective to keep counties and municipalities together.[2] Though totally disregarded in the 12th District, that objective was substantially followed in the other 11 districts *(see Table 2)*. Nine districts keep half or more of their counties intact. Two districts (4th and 6th) have some counties that are intact. Only the 12th District has no county, and none of its eight principal municipalities, which is not divided.

In my opinion, the only explanation why the state selectively disregarded its objective of maintaining intact counties and municipalities in the 12th District is that that objective undermined and conflicted with the predominate objective of maximizing the district's black population. The new 12th District follows and carries over the same methodology of the former 12th District — that is dividing all counties and municipalities in order to maximize its black population.

The 11 districts that include some undivided counties average 65 percent intact counties. The average for all 12 districts is 60 percent intact counties. Of North Carolina's 100 counties, 22 of them are divided. Sixteen of the 22 divided counties border either the 12th District or the 1st District. This reveals to me, again, that dividing counties is both a characteristic and a tool of race-based redistricting in North Carolina. In my opinion, the inclusion of some minimum number of intact counties in a district is an important test of whether that district is race-based. It appears to me that the reason the 12th District has no intact counties was because race was the predominant consideration.

Lacks common characteristics — The "common characteristics" test is a common-sense criteria, that I believe has been applied in redistricting cases, to determine whether race predominated in drawing a district. For example, if a district has a bizarre shape and contains no intact counties, it might allay suspicion if some other districts in the jurisdiction were also bizarrely shaped, or also lacked intact counties, or were both bizarre and lacked intact counties. The 12th District's bizarreness and lack of intact counties are shared by no other Congressional districts in North Carolina.

III. "METROPOLITAN DISTRICT" A SUBTERFUGE FOR RACE CONCENTRATION

Defenders of the 12th District have described it as a "metropolitan district" that "gathers like . . . metropolitan areas of Charlotte and the Triad." No geographic, economic, historic or demographic data exists to support the notion that Charlotte-Mecklenburg and the Triad counties of Forsyth and Guilford are one metropolitan area. Mecklenburg and Guilford counties have not shared the same Congressional district since 1792. Then, all of western North Carolina was in one district. Mecklenburg and the Triad counties are also defined by their separate newspaper circulation and broadcast service areas.

If the state had wanted to develop a bonafide "metropolitan district," two logical groupings would have been Forsyth and Guilford counties as one metropolitan district and Mecklenburg County as another. With 511,433 residents, Mecklenburg County has 93 percent of the population required for a Congressional district. It could have been supplemented with another 41,000 residents from suburban areas in any of five adjoining counties.

Guilford and Forsyth, the state's third and fifth most populous counties, have a combined population of 613,298 residents. The surplus 61,000 residents could have been logically transferred from outlying, semi-rural portions of either county and placed in the predominately rural and semi-rural 5th District that encompasses the state's northwestern region.

It is clear to me that the reason these options were not considered was because neither option would have produced a district that had more than about 29 percent minority population. However, by connecting two predominately African-American urban cores in separate metropolitan areas — and linking them through a predominately rural corridor — the resulting district was able to over-concentrate its minority population to 48 percent. In my opinion, the new 12th District is evidently a direct derivative of the old 12th District, in which racially drawn urban cores in different metropolitan areas were linked together through rural corridors.

IV. 1ST DISTRICT MAJORITY EXCEEDS VOTING RIGHTS MANDATE

Northeastern North Carolina has historically been home to the state's largest concentration of African-American residents. About a quarter million African-Americans live in the rural counties clustered near the state's northeastern border with Virginia. This is more blacks than live in any single metropolitan area of the state, including the Triad, Triangle, and Metrolina.[3]

History and demographics make northeastern North Carolina a logical location for a "minority-opportunity" district, where blacks make up a substantial portion of the district population. When the state passed its original post-census redistricting plan in early 1991, a minority-majority district was proposed for the northeastern region. Unlike the 12th District, a minority-

opportunity Congressional district in the state's northeastern region does have historical and demographic legitimacy.

However, the new 1st District over-concentrates a legitimate community of African-Americans into an artificial majority by excessively dividing counties. Half of the district's 20 counties were divided, generally on a racial basis, in order to give the 1st District a contrived black majority. The final Senate-House "compromise" plan had the most divided counties. Earlier versions divided fewer counties. In the initial House plan, five of 22 counties (23 percent) were divided.

The former 1st District covered 28 counties, and divided 19 of them. The new 1st District covers 20 counties, and divides 10 of them. Formerly 57 percent black and 58 percent minority, the 1st District is now 50.27 percent black and 51.38 percent minority. The divided counties generally follow the same pattern as the 12th District, with the maximum number of blacks and the minimum number of whites being assigned to the race-based district. Thus, the districts are not narrowly tailored to meet a legitimate state objective.

V. WHITE VOTES CEMENT CLAYTON'S OVERWHELMING ADVANTAGE

Rep. Eva Clayton was elected to Congress from the 1st District with 68 percent of the vote in 1992; 61 percent in 1994; and 67 percent in 1996 — an average of 66 percent over three general elections. This high re-election margin can be attributed to

Clayton's receiving 90 percent or more of the district's black vote and a substantial share of the white vote. A recent *News and Observer* report estimated Clayton's white support during those three general elections to be about 25 percent.[4] Analysis of Clayton's 66-percent margins indicates her white support could be higher *(see calculation below)*.

52%** (black voters) x **100%** (voted for Clayton) = **52%
48%** (white voters) x **29%** (voted for Clayton) = **14%
***52% + 14% = 66%** (Clayton re-election average)*

If black participation in her 57-percent district were 52 percent (reflecting a lower black voting-age population), and if Clayton received 100 percent of that vote, she would have received 29 percent of the white vote. If Clayton's black support were less than 100 percent, or if black participation were lower than 52 percent, her white support could have been higher.

When minority-majority districts were instituted, it was assumed that a 55-65 percent black population was needed to overcome white bloc voting and consequent defeat of the minority-preferred candidate. Since some white voters do, in fact, vote for the minority candidate, the 1st District's 57 percent black population — supplemented by white votes — has translated to an assured and overwhelming victory for the minority Congressional candidate.

Even in the reduced, 50.3-percent-black 1st District, the minority candidate has an excessive advantage. In the 20 counties of the

new 1st District, the 1996 results for President, U.S. House, and U.S. Senate confirm a continuing, overwhelming advantage for the minority candidate: Bill Clinton received 61 percent of the two-party vote; Democratic House candidates (Clayton, Neil Cashion, Bob Etheridge, George Parrott) received 61 percent; and Harvey Gantt received 56 percent.[5]

While Rep. Clayton, as the incumbent, could expect a higher level of support, I believe Harvey Gantt's 56-percent vote in his 1996 race against Sen.Jesse Helms represents the core-level support available to a non-incumbent black challenger facing a white incumbent. Rep. Clayton confirmed the importance of the Gantt vote in redrawing her district during a talk to a UNC audience two days before the redistricting plan was finalized.

According to a newspaper account, Clayton cited "inside information" based on "voting patterns in Gantt's U.S.Senate race" that showed the new 1st District would "enjoy a 56-percent majority of sympathetic . . . former Gantt supporters" *(see Exhibit B)*.

VI. WINNERS AND LOSERS DECIDED ON THE BASIS OF RACE

The Voting Rights Act (VRA) requires that elections be "equally open" to racial minorities — and that minorities not have "less opportunity than other members of the electorate to participate in the political process and elect representatives of their choice."

However, by creating an artificially contrived black majority, the state has gone well beyond what the VRA authorizes in assuring "equal opportunity." The result is assured victory for minority voters and the minority-preferred candidate and assured defeat for other voters and candidates.

Facing a built-in 12-point minimum deficit, Rep. Clayton's general election opponents have no more opportunity of being elected than they did in the previous 1st District. Thus, the state, using divided counties as a tool of race-based redistricting, has given minority voters in the 1st District — not just an "equal opportunity" to win — but a virtual certainty of winning.

When the state intervenes to grant one group of voters more than a 50-percent probability of electing its candidate of choice, that denies to all other voters and candidates an equal opportunity to participate. A state-imposed 56-percent core-level advantage for the minority-preferred candidate cannot be considered "equal opportunity participation."

In my opinion, redistricting intended to assure victory to some and consequent defeat to others — on the basis of race — exceeds the Voting Rights Act mandate and is a denial of equal protection of the laws under the 14th Amendment to the U.S. Constitution.

VII. "EQUAL OPPORTUNITY" QUANTIFIABLE IN NORTH CAROLINA

If "equal electoral opportunity" can be accepted as being somewhere close to a 50-percent probability of winning, the level of black voting-age population (BVAP) needed to achieve "equal electoral opportunity" for minority Congressional candidates has been quantified in recent research by Columbia University political scientists Charles Cameron, David Epstein, and Sharyn O'Halloran. Their research appeared in an article entitled "Do Majority-Minority Districts Maximize Black Representation in Congress?" *American Political Science Review* (December 1996).

The researchers used a "multinomial logit" statistical methodology to estimate the level of BVAP in Southern states needed "to achieve a 50 percent probability that the elected representative is a black Democrat, that is, *the point of equal opportunity for minority voters to elect their candidate of choice."* The researchers conclude: "In the South, the required level of BVAP (for equal opportunity) is 40.3 percent . . . given present turnout" *(see Exhibit C).*

To determine how the Cameron research might apply to North Carolina, I identified a group of 17 intact counties in northeastern North Carolina whose combined population equals a congressional district. The subject area is nearly identical to one in a redistricting proposal published by the *Charlotte Observer* that reporter Jim Morrill and legislative staff member Dan Frey worked together to compile *(see Exhibit D).*

This 17-county area has a population of 553,068; a black population of 44 percent; and an overall minority population of 45 percent. The area's BVAP is 40.6 percent,[6] almost identical to the 40.3 percent of BVAP listed in the research. Results of the 1996 elections in the subject area were: Clinton, 57 percent (two-party vote); U.S. House candidates (Clayton, Cashion, Etheridge, Parrott), 59 percent; and Harvey Gantt, 50.9 percent.

VIII. 1ST DISTRICT SIX PERCENTAGE POINTS "OVER-CONCENTRATED"

If Gantt's 51-percent vote represents the core-level support available to a non-incumbent black candidate facing a white opponent, there would be a strong correlation between the Cameron research and voting patterns in northeastern North Carolina. In other words, Cameron's 40.3 percent BVAP closely approximates the appropriate level of BVAP for providing minority voters in northeastern North Carolina a 50-percent probability — thus an "equal opportunity" — to elect their Congressional candidate of choice.

As the incumbent, and based on her past performance in the 17-county area where she was on a large percentage of the ballots, Rep. Clayton, in my opinion, would likely exceed 51 percent of the vote. However, in a scenario where a "generic" black candidate has the same core-level support as Gantt, but may have less white (and black) support than Clayton, I believe 40-percent BVAP would position that candidate to be fully competitive with

a white opponent: *(Scenario assumes participation to be 40 percent black and 60 percent white)*

40%** (black voters) x **90%** (support for black candidate) = **36%
60%** (white voters) x **25%** (support for black candidate) = **15%
***36% + 15% = 51%** (minority electoral opportunity)*

Thus, with 50 percent black population and 46.5 percent BVAP, the redrawn 1st District is approximately six percentage points "over-concentrated" beyond the point of "equal electoral opportunity" for all voters and candidates.

IX. VOTING RIGHTS NOT A MANDATE FOR "SAFE SEATS"

As I understand the Voting Rights Act, its purpose is not to provide "safe minority seats" — but to assure that minority voters have the *same opportunity* as other voters to participate in the election process. As presently constituted, North Carolina's race-based 1st District fails to provide the same opportunity for all voters to elect their representatives of choice. For those reasons, I am convinced the 1st Congressional District is a misinterpretation and abuse of the Voting Rights Act and that it violates the 14thAmendment to the U.S. Constitution.

"Over-concentration" and "assured victory" are even more pronounced problems in the 12th District. By the state's estimate in the redistricting plan. the new 12th District is composed of 66 percent former Harvey Gantt supporters. In my opinion, this rules out any opportunity for meaningful participation by other voters

and candidates. Though these violations certainly apply, they are, in my opinion, overshadowed by the 12th District's racial classifications, racial assignments, and overall non-legitimacy as a district.

In vivid contrast to the race-based 1st and 12th districts, a legitimate "minority-opportunity"district has existed in both the 1992 and the 1997 redistricting plans. That district is the 4th District in the Triangle area. In both the 1992 and 1997 plans, the 4th District did not resort to bizarre shapes and showed no indication that race was the predominant factor. Yet in both plans, Harvey Gantt won a convincing 59 percent of the district's vote. While it is impossible to draw two non-race-based black-majority districts, the evidence shows it is possible to have at least two "minority-opportunity"districts — one in the northeast and one in the Triangle.

X. WHITE CROSS-OVER VOTING ENHANCES MINORITY OPPORTUNITY

If Gantt's 1996 vote is the measure, black candidates, helped by white cross-over voting, have electoral opportunities in additional areas of the state *(see Exhibit E)*. The following examples show the possibility for drawing non-race-based minority-opportunity Congressional districts that are geographically compact and maximize intact counties.

Metrolina area — Gantt won 55 percent of the vote against Helms in Mecklenburg County, which has 93 percent of the

population for a Congressional district. With a respectable showing in the remaining 7-percent population area outside of Mecklenburg County, Gantt would have been solidly positioned in a "Metrolina district."

Triad area — The combined Guilford-Forsyth County vote was 51-49 percent for Helms. In a Guilford-Forsyth "Triad District," 61,000 people would be removed to achieve population equivalence. In either county, the outlying areas most likely to be removed are predominately rural and semi-rural. Since those type areas are more heavily populated with conservative voters, their removal would likely have pulled Gantt even with, or slightly ahead of, Helms in a "Triad District."

Southeastern area — The state's other high concentration of racial minorities is found in the southeastern region. A Congressional district anchored by Cumberland and Robeson counties and extending along the South Carolina border would be 44 percent minority. Such a grouping would provide a second predominately rural district and a strong electoral opportunity for a minority candidate. For example, in seven southeastern counties — Bladen, Brunswick, Columbus, Cumberland, Hoke, Robeson, and Scotland — Gantt was favored by 53.7 percent of voters over Helms.

The Gantt results in the state's major metropolitan areas — Metrolina, the Triad, and the Triangle—confirm the significant level of white cross-over voting that occurs in urban areas. The

BVAP in these urban counties is generally under 25 percent, which means whites were crossing over at rates of 40-50 percent to vote for Gantt.

The relatively high levels of white cross-over voting in the urban counties refute the state's claim that electoral opportunities for black candidates can only be provided by over-concentrating minorities into an artificial district extending across separate metropolitan areas. The level of cross-over voting also suggests that in urban areas of the South, the *"point of equal opportunity for minority voters to elect their candidate of choice"* is considerably lower than the 40.3-percent BVAP in the Cameron research.

The southeastern border area contains perhaps the most diverse group of voters in North Carolina. Non-blacks — including Native Americans, Hispanics, and Asians — account for about one-quarter of the area's 44-percent minority population. Despite claims that black and Native American voters are not politically cohesive, Gantt's 54-percent vote in this 7-county area shows that a diverse coalition of minority voters, plus white cross-over voters, can be sustained to provide strong electoral opportunities for a minority candidate in a rural area of North Carolina.

XI. CONCLUSION

Three Congressional elections have now been held under an unconstitutional redistricting plan. In drawing a remedial plan,

the General Assembly looked only to a previously invalidated plan as a starting point and ignored other possible plans. In my opinion, this shows the state is intending to perpetuate a racially gerrymandered redistricting plan.

Elected officials face an inherent conflict of interest any time they draw districts — for themselves or for other elected officials. This has never been more evident than in the General Assembly's repeated drawing of districts that classify and separate voters by race. Fortunately, other alternatives exist.

For example, some states have minimized the partisan effects of redistricting by turning over the task to non-partisan, independent redistricting commissions. The courts themselves have resolved disputes over redistricting by drawing the districts or by appointing "special masters" to do the redistricting.

Though not currently authorized by statute for Congressional elections, multimember districts and proportional voting methods would be another means of assuring fair representation for racial minorities. A proportional voting system would most likely put an end to all forms of gerrymandering by removing the incentive to manipulate district lines.

If allowed to stand, this redistricting plan, and the 12th District in particular, could undermine the election process into the next decade and century. Gerrymandering in this redistricting plan is moving us toward a quasi-appointed Congress, whose members

receive their "appointments" from legislative redistricting committees.

The "anything goes" philosophy, in which county and municipal boundaries are utterly disregarded, could give rise to drawing districts that serve only the self-interested ends of the people who draw them. An essential step in restoring public confidence in the election process is to restore integrity to the redistricting process.

/s/ Lee Mortimer
Affiant

State of North Carolina
County of Durham

Sworn to and subscribed before me this 26th day of January, 1998

/s/ Anita Robinson
Notary

(Official Seal)
Notary Public

My commission expires 10/28/2002

NOTES

1. "Democrats express redistricting reservations," Associated Press, Feb.25,1996.

2. "Legislators loath to split counties when redistricting," Associated Press, Dec. 29, 1996. Cover page of initial Senate redistricting plan (February 1997) made several references to priority for intact counties.

3. Source: U.S. Census Bureau

4. "Clayton to seek re-election," *News and Observer*, Nov. 1, 1997

5. This analysis of Presidential, U.S. Senate, and U.S. House results is based on returns from the 10 intact counties of the new 1st District as reported on the State Board of Elections Internet site. Additionally, the Board of Elections provided me 1996 precinct-level results for the 10 divided counties assigned to the new 1stDistrict. Most precinct names correlated with precincts listed in the state's redistricting plan. The only county for which precincts were difficult to correlate was Beaufort, which accounts for about four percent of the district's population. Any discrepancy in my reading of the figures would change the analysis by no more than one to two percentage points.

6. Source: U.S. Census Bureau

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
Eastern Division
Civil Action No. 040-CV- 104-H2

MARTIN CROMARTIE, *et al.*	)
	)
v.	)
	)
JAMES B. HUNT, JR., in his capacity as governor, *et al.*	)

AFFIDAVIT OF JOHN WEATHERLY

John Weatherly, being duly sworn, declares and says as follows:

I am a citizen and resident of Cleveland County, North Carolina, and I am now serving in the North Carolina House of Representatives as the representative from the 48th House District which includes Cleveland County. Previously I served as a Representative in the 1989, 1993 and 1995 sessions. Currently I am Chair of the House State Government and Properties Committee and am a member of the Environmental Committee, the Agricultural Committee, and the House Appropriations Committee. During my service in the House of Representatives, I have become increasingly concerned about the need for reform in the electoral process and, because of my interest in this issue, I served in the fall of 1996 as one of the

fifteen members of the General Assembly's Election Law Reform Committee.

During my service in the General Assembly, I have become aware of the extensive gerrymandering that has taken place in the creation of districts for electing members of Congress and of the General Assembly. The existence of this gerrymandering is apparent from an examination of the maps that show the redistricting and reapportionment plans that were enacted during the 1991 Session of the General Assembly and the redistricting plan that was enacted in March of 1997. Because of the flagrant gerrymandering that has taken place, I proposed a constitutional amendment that would place the responsibility for congressional redistricting and legislative reapportionment in a non-partisan commission. This commission would draw, electoral districts in a manner that disregarded race, political party and incumbency, and relied instead on traditional redistricting principles, such as Geographical compactness, contiguousness, political subdivisions, and real communities of interest.

Early in its 1997 session, the General Assembly was considering the preparation of a redistricting plan to replace the plan enacted in 1992, which the Supreme Court had declared unconstitutional in June 1996. As a means of preparing a constitutional plan, I suggested that the General Assembly created a redistricting commission along the lines of my proposed constitutional amendment. In this connection, I

introduced a bill that would have directed the creation of a redistricting commission to prepare a congressional redistricting plan for use in the 1998 elections. This bill, if enacted, would have provided a means for drawing a race-neutral and party-neutral redistricting plan that would replace the plan which the Supreme Court had declared unconstitutional in *Shaw v. Hunt*. This new plan would have been submitted for a vote, up or down, in the General Assembly. By use of the redistricting commission, the General Assembly would have eliminated any taint or carry-over from the redistricting plan that was ruled unconstitutional by the Supreme Court.

Although I was not serving in the General Assembly in 1991-92 when the congressional redistricting plan was prepared for use in the 1992 and subsequent elections, I readily concluded that race had predominated in the drafting of that plan - especially with respect to the First and Twelfth Districts. Indeed, this was apparent even from the shape of the districts, when considered in relation to concentrations of African-American population in North Carolina. I am especially aware of the racial gerrymandering of the Twelfth District in the 1992 plan because I reside in the adjacent Ninth congressional district, whose shape was significantly affected by the racial gerrymandering of the Twelfth District.

The appearance of the First and Twelfth Districts in the current plan, which was enacted by the General Assembly in

March of 1997, does not reveal the racial motive as readily as did the appearance of the corresponding districts in the 1992 plan. In other words, the new districts are somewhat less "bizarre." However, as I confirmed by examining recently a map of the current districts, race was still a predominant motive in their creation. This is especially obvious to me with respect to the current Twelfth District; a comparison of the boundaries of the Twelfth District with the concentrations of the African-American population in the six counties of which portions are included in the Twelfth District makes evident to me that race predominated in the drawing of that district. Not only the redistricting plan itself, but the events that occurred during the 1997 session of the General Assembly lead me to conclude that race predominated in determining the boundaries of the First and Twelfth Districts. Basically, the premise for the current plan was that two congressional districts should be created in each of which an African-American would be elected to Congress. Indeed, the premise was even more specific - namely, that the election of the two current African-American incumbents would be assured. Subordinate to this objective was the re-election of other incumbents along party lines to maintain the 6-6 party balance in the congressional delegation; but it is clear to me that the indispensable part of the plan was to assure the creation of two districts that would re-elect the black incumbents.

From my knowledge of North Carolina and its politics, including the politics of the General Assembly, I am convinced

that the predominate motive - indeed, almost the only conceivable motive - for linking together Mecklenburg County with Guilford and Forsyth Counties in a single congressional district was the racial motive of guaranteeing the election of an African-American. Although I am not as familiar with the area encompassed in the current First District, I believe the same conclusion applies to it. In each instance my conclusions are based on statements made on or off the floor of the General Assembly or in Committee, on the final results of the redistricting process, and on my experience as a legislator.

Further declarant sayeth not.

/s/ John Weatherly

Subscribed and sworn to before me
this 22nd day of January, 1998.

/s/ Beverly Adams
Notary Public

My commission expires 1/24/2000

[This page intentionally left blank]

[This page intentionally left blank]

AFFIDAVIT OF J. H. FROELICH, JR. (CD 34)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
RALEIGH DIVISION
Civil Action No. 4.96-CV-104

MARTIN CROMARTIE, *et al.*, Plaintiffs,	)
vs.	)
JAMES B. HUNT, JR., in his official capacity as Governor of the State of North Carolina, *et al.* Defendants.	)

AFFIDAVIT OF J.H. FROELICH, JR.

J.H. Froelich, Jr., being duly sworn, declares and says:

I am a citizen and resident of High Point, North Carolina which is in Guilford County. I have lived here all my life; and I am currently in my sixties. I have been involved in the import and export of furniture and materials intended for use in making furniture. and I have also participated in a variety of other business activities. In addition, I have been active in politics at the local and state level, and in 1972 managed statewide the gubernatorial campaign of the Democratic nominee, "Skipper" Bowles. I am a plaintiff in this action; and I provided an affidavit as a witness for the plaintiffs in the trial of *Shaw v. Hunt*.

AFFIDAVIT OF J. H. FROELICH, JR., CONTINUED . . .

When the Congressional redistricting plan was enacted in 1992, I believed that the plan was unconstitutional because of the strange way in which the districts had been drawn. There seemed to be no relation between the drafting of district boundaries and the application of traditional race-neutral redistricting principles. Because of the bizarre way in which the Congressional districts had been drawn – sometimes with precincts being split among two or more Congressional districts – it was hard for a voter to know in what district he had been placed. Indeed, when I went to vote in 1992, I did not realize that I was in the Twelfth District. After the 1992 plan was declared unconstitutional, the General Assembly in 1996 produced a new plan. However, that plan represents little improvement upon the earlier plan – at least, with respect to the area of the state in which I live. Clearly race – just as for the 1992 plan – predominated in the drawing of the Twelfth District, which bisects Guilford County. Apart from a racial motive, I find it hard to believe that anyone in North Carolina could justify putting Mecklenburg County in the same district with any part of Guilford County. Indeed, all of Mecklenburg County would be placed in a single district if traditional race-neutral principles of redistricting were involved: likewise, all of Guilford would be in the same district.

AFFIDAVIT OF J. H. FROELICH, JR., CONTINUED . . .

Further declarant sayeth not.

/s/ J.H. Froelich, Jr.

NORTH CAROLINA
GUILFORD COUNTY

Subscribed and sworn to before me
this 2nd day of February, 1998.

/s/ Linda L. Willard
Notary Public

My Commission expires: 11-5-00

[This page intentionally left blank]

AFFIDAVIT OF R. O. EVERETT (CD 34)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
RALEIGH DIVISION
Civil Action No. 4.96-CV-104

MARTIN CROMARTIE, *et al.*,
Plaintiffs,

vs.

JAMES B. HUNT, JR., in his official capacity as Governor of the State of North Carolina, *et al.*
Defendants.

AFFIDAVIT OF R.O. EVERETT

R.O. Everett, being duly sworn, declares and says as follows:

I am a citizen and resident of Salisbury, North Carolina, which is located in Rowan County; and I have resided here for more than three decades. For many years I was the city executive for Wachovia bank here in Rowan County. Over the years my wife and I have participated actively in politics in Rowan County. A few years ago, I ran unsuccessfully to serve in the North Carolina House of Representatives. I am one of the Plaintiffs in this case because I am convinced that the

present redistricting plan is racially gerrymandered and that this is unhealthy for the electoral process in North Carolina.

Although I have lived in other parts of the State earlier in my life, I am especially familiar with Rowan County and its neighboring counties. Because of that familiarity, it was easy for me to perceive that in the 1992 Congressional redistricting plan the Twelfth District, which cut through Rowan County had a shape which was predominately motivated by race. After the original Twelfth District had been declared unconstitutional, I had hoped that in any new plan the districts of the state would be drawn without regard to race. Unfortunately, this did not occur. Under the present plan, the Twelfth District is still racially gerrymandered – that is, its shape is motivated predominately by race – and this has a corresponding effect on the boundaries of the adjacent districts. With specific reference to Rowan County, I am convinced that had race-neutral principles been followed, such as compactness, contiguousness, and respect for the boundaries of political subdivisions, the district boundaries would have been quite different. Indeed, Rowan County would probably not have been included at all in the Twelfth District. In view of the size and location of Mecklenburg County, it seems obvious to me that no part of Rowan would have been placed in the same district with Mecklenburg if race-neutral districts had been drawn by the General Assembly.

Further declarant sayeth not.

/s/ R.O. Everett

NORTH CAROLINA
ROWAN COUNTY

Subscribed and sworn to before me
this 30th day of January, 1998.

/s/ Jo Ann L. Foster
Notary Public

My Commission expires: 1-16-2002

[This page intentionally left blank]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
EASTERN DIVISION
Civil Action No. 4-96-CV-104-BO(3)

MARTIN CROMARTIE, THOMAS CHANDLER MUSE, and GLENNES DODGE WEEKS,	)
Plaintiffs,	)
v.	)
JAMES B. HUNT, JR., in his official capacity as Governor of the State of North Carolina, et al.,	)
Defendants.	)

DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT

Defendants, pursuant to Rule 56(b) of the Rules of Civil Procedure, respectfully move the court to enter summary judgment for them on all claims made by plaintiffs. In support of this motion, defendants rely upon the following documents, all of which have been filed contemporaneously with this motion:

1. Defendants Brief In Opposition to Plaintiffs' Motion for Summary Judgment and in Support of their Cross-Motion for Summary Judgment.

2. The Affidavit of Gary O. Bartlett, Executive Secretary-Director of the State Board of Elections.

3. The Affidavit of Senator Roy A. Cooper, III.

4. The Affidavit of Representative W. Edwin M°Mahan.

5. The Affidavit of Dr. David R. Goldfield.

6. The Affidavit of Dr. David W. Peterson.

7. The Affidavit of Dr. Alfred W. Stuart.

8. The Affidavit of Dr. Gerald R. Webster.

WHEREFORE, defendants respectfully request the Court (1) to enter summary judgment for them. (2) to deny plaintiffs' motion for summary judgment. (3) to dismiss this action and (4) to allow them such other relief as may be just and proper.

This the 2nd day of March, 1998.

MICHAEL F. EASLEY
ATTORNEY GENERAL

/s/ Edwin M. Speas, Jr.
Senior Deputy Attorney General
N.C. State Bar No. 4112

/s/ Tiare B. Smiley
Special Deputy Attorney General
N. C. State Bar No. 7119

/s/ Norma S. Harrell
Special Deputy Attorney General
N.C. State Bar No. 6654

N.C. Department of Justice
P.O. Box 629
Raleigh, N.C. 27602
(919) 716-6900

[Certificate of Service omitted in printing]

[This page intentionally left blank]

[This page intentionally left blank]

¶97C-27R. Other Material Concerning the Purpose of the Plan

Nearly 200 congressional redistricting plans have been drawn by legislative staff, interest groups, and the public using the North Carolina General Assembly's redistricting computers since January 1, 1996. There were a few exploratory plans drawn by the legislative staff in the fall of 1995 after the United States Supreme Court overturned Georgia's congressional redistricting plan. Some plans were never completed and some are duplicates of others. Plans that were actually presented during the legislative process as alternatives are discussed below and most are also discussed in ¶97-27H:

1. Plans Publicly released by the House and/or Senate

(a) Congress-96-001: This plan was released by Representative Richard Morgan to the House Rules Committee in July, 1996. The plan was never voted on by the Committee. *See* ¶97C-27H and Attachment 97C-27R-1. The plan contained a district from Charlotte to Robeson County similar to the district contained in the plan offered by Senator Betsy Cochrane as an amendment to 1997 Congressional Plan A and to the plan eventually enacted. (*See* Attachment 97C-27R- 11 for the plan proposed by Senator Cochrane). Representative Morgan's primary goal in releasing the plan at that time was to establish that a redistricting plan could be drawn in time for the 1996 elections. That plan was never considered by the General Assembly after the public hearing.

¶ 97C-27R., CONTINUED . . .

(b) 1997 Congressional Plan A: This was the first plan released by Senator Cooper to the Senate Select Committee on Redistricting on February 20, 1997. The plan was approved by the Committee on March 19, 1997 as Senate Bill 433, but was withheld from a vote on the Senate floor as negotiations between the House and Senate continued on a compromise plan. This plan is contained in 3 different forms in Attachment 97C-27R-2: as released on February 20; as re-released on February 24 with a contingent zero-deviation plan; and as released again on March 18 as Senate Bill 433.

(c) 1997 House Congressional Plan A.I: This was the first plan released by Representative McMahan to the House Committee on Congressional Redistricting. It was presented at the February 25, 1997 meeting, of the committee. The plan was never voted on by the committee. *See* Attachment 97C-27R-3.

(d) 97 House Congress Plan G: This plan was submitted to the House Committee on Congressional Redistricting on March 19, 1997. The Committee approved it and had it introduced as a committee bill (House Bill 586). The bill was sent back to Committee. (*See* Attachment 97C-27R-4).

(e) 97 HOUSE/SENATE PLAN: This plan represented the plan agreed to by the House and the Senate. The plan was approved by the House Committee on Congressional Redistricting on March 25, 1997. The plan was amended on

¶ 97C-27R., CONTINUED . . .

the floor of the House by Rep. Ronnie Sutton, and the amended version was sent to the Senate as 97 HOUSE/SENATE PLAN A. *See* ¶97C-27H for a discussion of the Sutton amendment. *See* Attachment 97C-27R-5 for this plan.

2. House Committee Amendments

(a) Blue Amendment: Representative Dan Blue offered an amendment that was destined primarily to preserve the 4th district essentially in its 1992 form instead of having it divided between the 2nd and 4th district. The amendment was rejected. *See* Attachment 97C-27R-6.

(b) Sutton amendment: Representative Ronnie Sutton of Robeson County offered an amendment to shift a predominantly Native American precinct in Robeson County from District 8 back to District 7 and to "make up the population difference" in Cumberland County. Representative Sutton did not identify which precincts in Cumberland County should be moved to account for this change. Counsel to the Committee suggested that he make this change as a floor amendment to the bill so that the appropriate precincts could be identified and the population data recalculated on the computer. For purposes of the proposed back-up plan containing zero population deviation (97 HOUSE/SENATE PLAN 0), census blocks within a precinct would also have to be identified and moved and the population figures recalculated to ensure that there was still zero population deviation in Districts 7 and 8.

¶ 97C-27R., CONTINUED . . .

Representative Sutton's amendment was defeated in committee. (Note: Representative Sutton offered an amendment on the floor the following day, complete with a statistical analysis. *See* below).

3. House Floor Amendments

(a) Representative Sutton offered an amendment on second reading of the bill, complete with statistical analysis, to both the primary plan and the alternate zero deviation plan. His amendment moved a predominantly Native American precinct from District 8 to District 7, moved Fort Bragg from District 7 to District 8, and changed western Cumberland County and western Fayetteville to offset the population difference in District 7 created by the transfer of Fort Bragg. This amendment passed 117-0. *See* Attachment 97C-27R-7. The recorded vote is attached as Attachment 97C-28F-4H.

(b) Representative Mickey Michaux offered the following three related amendments to House Bill 586 on second reading of the bill:

(1) Fitch/Michaux Plan A *(See* Attachment 97C-27R-8)

(2) Fitch/Michaux Plan B *(See* Attachment 97C-27R-9)

¶ 97C-27R., CONTINUED . . .

(3) Fitch/Michaux Plan C *(See* Attachment 97C-27R-10)

Representative Michaux announced that the purpose of his amendments was to maximize the minority vote by creating more minority influence districts. *See* House floor debate, Attachment 97C-28F-4F(1), pp. 9-10.

Each of these amendments contained a northeastern majority-minority district (District 1) comparable to the proposed District I in House Bill 586. The percentage of African-American population (total population) of District I in all three Fitch/Michaux plans was 50.23%. (It is 50.27% in the enacted plan). Each of the amendments also contained a new District 5 running from Durham to Greensboro and a District 12 running from Charlotte to Winston-Salem. In Plan A, District 5 runs from Granville County through Durham into Greensboro. In Plans B and C, District 5 runs from Durham to Greensboro and then to High Point. The amendments also had variations in District 7. In Plan B, Robeson County is in District 8. In Plan C, Robeson County is in District 7.

The percentage of African American and Native American population, based on 1990 census data, for Districts 1, 5, 7, and 12 in the Fitch/Michaux Plans were as follows. (Note: for District 7, the first number is African American population percentage; the second number is Native American population

¶ 97C-27R., CONTINUED . . .

percentage. For the other districts, the number is African American population percentage):

	District 1	District 5	District 7	District 12
Plan A:	50.23	33.88	29.62/8.61	37.44
Plan B:	50.23	34.41	32.17/1.39	37.66
Plan C:	50.23	34.41	30.02/8.55	37.66

All three amendments were voted on in the House and defeated by the following margins: Plan A (90 to 27); Plan B (90 to 26); Plan C (87 to 30). The recorded votes on these amendments are attached as Attachment 97C-28F-4H.

Representative Michaux's amendments were rejected because they did not preserve the partisan balance in House Bill 586 nor did they preserve the cores of the existing districts in the Piedmont. Plan B would have placed two Democratic incumbents in the same district: Congressman McIntyre from Robeson County and Congressman Hefner from Cabarrus County. All three plans (A, B, and C) would have placed two Republican incumbents together in District 6: Congressman Burr and Congressman Coble.

In addition, all three plans would seriously weaken the ability of the African-American incumbent in District 12 (Congressman Watt) to win re-election. The African-American

¶ 97C-27R., CONTINUED . . .

percentage in District 12 is only 37.66 percent in Plans B and C and 37.44 percent in Plan A --- approximately nine percent lower than the African-American percentage of District 12 in the enacted plan (46.67%).

The three Fitch/Michaux plans also reduce the percentage of African Americans in Districts 2, 3, 4 and 8 as compared to the enacted plan. as shown below:

	Dist. 2	Dist. 3	Dist. 4	Dist. 8
Enacted plan	27.91	19.79	21.02	27.73
Fitch/ Michaux A	23.62	18.82	19.55	18.62
Fitch/ Michaux B	23.71	16.77	18.93	20.90*
Fitch/ Michaux C	23.71	16.77	18.93	23.06

*This plan (B) also includes a Native American population of 8.64% in District 8.

4. Plans Offered in Senate Committee

Senator Betsy Cochrane offered an alternative plan. Cochrane Congress (Attachment 97C-27R-11), at the March 19, 1997 meeting of the Senate Committee. This plan was

offered as an alternative to the plan offered by Senator Cooper (1997 Congressional Plan A). Senator Cochrane's plan was rejected by the Committee. *See* the minutes from the Senate Committee meeting for that day in Attachment 97C-28F-4D(3) and ¶97C-27N for extensive discussion on Senator Cochrane's plan and why it was not accepted.

5. Plans Offered on Senate Floor

Senator Cochrane offered her plan again. *See* the discussion above. The plan was defeated by a vote of 27 to 18. *See* Attachment 97C-28F-4H for the recorded vote on the amendment.

6. Plans Discussed in Negotiations

Senator Cooper and Representative McMahan were involved in negotiations with each other for nearly three weeks in an effort to develop a plan that both the House and the Senate could agree to. These negotiations centered primarily on the division of Wake County between the 2nd and 4th districts.

Several proposed plans were exchanged during this time. The plans constituted a series of offers and counteroffers that gradually moved the Senate and House closer together. This series of changes can best be understood in light of the original plans released by both sides (1997Congressional Plan A in the

Senate and 1997 House Congressional Plan A.1 in the House) and how those plans came about.

In developing the Senate's initial plan as well as subsequent plans, Senator Cooper consulted with members of the congressional delegation and members of the Senate, particularly Senator Frank Ballance, Senator Leslie Winner, Senator Bill Martin, and Senator Marc Basnight. Senator Ballance, an African-American and the Deputy President Pro Tempore of the Senate, was consulted about placement of counties in the northeastern part of the state -- the area in which he resides (Warren County)--including the location of the boundaries of the new lst district. Senator Winner, counsel for the plaintiffs in the *Gingles* litigation in the early 1980s and a resident of Charlotte, was consulted about the composition of the 12th district, which includes much of Charlotte. Senator Martin, an African-American representing, much of Greensboro and Guilford County, was consulted both as to statewide plan issues and the placement of parts of High Point and Greensboro in the 12th district. Senator Basnight, President Pro Tempore of the Senate, was consulted on the plan generally and on the placement of counties in the northeast. Senator Basnight also resides in the northeast (Dare County). Senators Basnight and Ballance together represent most of northeastern North Carolina.

The initial Senate plan was perceived by many Republicans as treating incumbent Republican congressman Walter Jones

(3rd District) unfairly (*see*, for example, the comments of Representative McMahan to the House Redistricting Committee on February 25, 1997 at Attachment 97C-28F-4E(2)). The House Republicans felt that the 3rd district was perhaps their most critical district and that the Senate's proposal, especially in the 3rd district, threatened the 6-6 partisan balance. Rep. McMahan responded by releasing a plan (1997 House Congressional Plan A.1) that in many respects resembled the Senate plan. However, Rep. McMahan's plan also addressed the concerns about the 3rd district and created other intentional differences between the two plans to use as "bargaining chips" in negotiating primarily on three districts -- the 2nd, the 3rd, and the 4th. Representative McMahan also consulted with numerous individuals, including African-American and other members of the House and Democratic and Republican members of the North Carolina congressional delegation.

Although the boundaries of the 1st District were affected by changes in the 2nd, 3rd, and 4th districts, these changes did not significantly affect the percentage of African-Americans in the 1st District. This percentage fluctuated about two-tenths of one percent as a result of this series of changes. The enacted 1st district is similar to the 1st district that was originallv proposed by Senator Cooper after consultation with Senators Ballance and Basnight. As enacted it includes moreof the territory of the existing lst district than the original House plan, thus keeping more of Congresswoman Clayton's current constituency intact

in the district. At the same time, the counties in the coastal/Tidewater region (Chowan, Pasquotank, Perquimans, Currituck, and Tyrrell) are able to remain together with the coastal counties with whom they share economic and other interests.

Differences between the House and Senate plans in the 12th district were resolved quickly. The House agreed to include Winston-Salem in the 12th district in one of its first counter-offers to the Senate, recognizing that it was the only major city in the Triad area not included in the urban-based 12th district.

After the 3rd district and 12th district were resolved, the negotiations focused on the dividing line in Wake County between the 2nd and 4th districts. TheSenate considered that many of the House plans for the 2nd district were not consistent with the goal of keeping a partisan balance and the House felt that the 2nd district in the Senate plans did not reflect the partisan makeup of the prior 2nd district. This issue was the last to be resolved.

7. Plans Presented at Public Hearing

Several plans were presented at the public hearings. These plans are contained as exhibits to the public hearing transcripts and are included in Attachments 97C-28F-3A and -3B. Of these plans, it is believed that only three were ever introduced as bills or offered as amendments: the plan presented by

¶ 97C-27R., CONTINUED . . .

Senator Cochrane (offered as an amendment to the first Senate plan and to the plan that was eventually enacted); a plan introduced by Representative Steve Wood (House Bill 599); and a plan introduced by Representative Robert Grady (House Bill 585). *See* Attachment 97C-27R-11. Neither Representative Grady nor Representative Wood offered his plan as an amendment to House Bill 586.

8. Public Access and Other Plans

The legislature provides access to the public so that any member of the public may draw a redistricting plan. The legislature also provides a qualified staff person to assist members of the public in using the public access redistricting computer. Numerous plans have been drawn by members of the public and interest groups using the public access computer. Attachment 97C-27R-12 contains a list of all congressional plans drawn by legislative staff, the public and others since January 1, 1996. The legislative staff has reviewed this list and, after eliminating plans that were duplicates, has produced summary reports on all staff plans and public access plans, including some plans for which the districts were not completed or which were attempts to draw only certain districts. A map is also included with the reports. The reports provide summary information on population, voting age population, registration, and elections of the districts. This information is included in Attachment 97C-27R-12.

DB: NORTH CAROLINA — District Summary — Total Populations, All Ages — Plan: 97 HOUSE/SENATE PLAN A — Date: 3/26/97 — Time: 10:37 a.m. — Page: 1

Plan type: CONGRESSIONAL WITH 97 HOME SEATS

District Name	Total Pop.	Total White	Total Black	Total Am. Ind.	Total Asian/PI	Total Other
District 1	552,161 100.00%	268,458 48.62%	277,565 50.27%	3,461 0.63%	1,238 0.22%	1,440 0.26%
District 2	552,152 100.00%	388,234 70.31%	154,108 27.91%	2,267 0.41%	4,183 0.76%	3,363 0.61%
District 3	552,622 100.00%	429,481 77.72%	109,358 19.79%	2,131 0.39%	5,625 1.02%	6,027 1.09%
District 4	551,842 100.00%	421,224 76.33%	116,006 21.02%	1,454 0.26%	10,770 1.95%	2,391 0.43%
District 5	552,084 100.00%	471,868 85.47%	75,177 13.62%	1,045 0.19%	2,381 0.43%	1,613 0.29%

District 6	552,171 100.00%	493,140 89.31%	52,248 9.46%	2,039 0.37%	3,279 0.59%	1,463 0.26%
District 7	552,382 100.00%	371,545 67.26%	133,985 24.26%	40,845 7.39%	2,791 0.51%	3,216 0.58%
District 8	553,143 100.00%	373,569 67.54%	153,396 27.73%	14,294 2.58%	5,541 1.00%	6,343 1.15%
District 9	552,615 100.00%	481,834 87.19%	61,443 11.12%	1,517 0.27%	6,408 1.16%	1,413 0.26%
District 10	553,333 100.00%	512,213 92.57%	36,123 6.53%	933 0.17%	2,482 0.45%	1,583 0.29%
District 11	552,089 100.00%	512,127 92.76%	29,276 5.30%	7,888 1.43%	1,838 0.33%	960 0.17%
District 12	552,043 100.00%	284,799 51.59%	257,644 46.67%	2,282 0.41%	5,630 1.02%	1,689 0.31%

Total	6,628,637 100.00%	5,008,492 75.56%	1,456,329 21.97%	80,156 1.21%	52,166 0.79%	31,501 0.48%

DB: NORTH CAROLINA — District Summary — Date: 3/26/97
Voting Age Populations — Time: 10:37 a.m.
Plan: 97 HOUSE/SENATE PLAN A — Page: 1
Plan type: CONGRESSIONAL WITH 97 HOME SEATS

District Name	Total Vot. Age	Vot. Age White	Vot. Age Black	Vot. Age Am. Ind.	Vot. Age Asian/PI	Vot. Age Other
District 1	403,065 100.00%	211,273 52.42%	187,573 46.54%	2,450 0.61%	872 0.22%	955 0.24%
District 2	419,099 100.00%	303,740 72.47%	108,234 25.83%	1,649 0.39%	3,169 0.76%	2,307 0.55%
District 3	417,769 100.00%	330,971 79.22%	76,672 18.35%	1,657 0.40%	4,012 0.96%	4,457 1.07%

District 4	427,266 100.00%	332,013 77.71%	84,535 19.79%	1,118 0.26%	7,927 1.86%	1,673 0.39%
District 5	428,181 100.00%	370,222 86.46%	54,468 12.72%	774 0.18%	1,679 0.39%	1,039 0.24%
District 6	426,321 100.00%	384,226 90.13%	37,317 8.75%	1,472 0.35%	2,263 0.53%	1,044 0.24%
District 7	408,299 100.00%	287,254 70.35%	90,009 22.04%	26,816 6.57%	2,067 0.51%	2,153 0.53%
District 8	402,666 100.00%	283,487 70.40%	101,961 25.32%	9,096 2.26%	3,909 0.97%	4,213 1.05%
District 9	419,559 100.00%	371,456 88.53%	41,670 9.93%	1,110 0.26%	4,358 1.04%	966 0.23%
District 10	425,367 100.00%	396,936 93.32%	25,136 5.91%	696 0.16%	1,499 0.35%	1,102 0.26%

District 11	430,111 100.00%	402,639 93.61%	20,455 4.76%	5,159 1.20%	1,257 0.29%	601 0.14%
District 12	414,784 100.00%	228,346 55.05%	179,846 43.36%	1,671 0.40%	3,812 0.92%	1,109 0.27%
Total	5,022,487 100.00%	3,902,563 77.70%	1,007,876 20.07%	53,668 1.07%	36,824 0.73%	21,619 0.43%

DB: NORTH CAROLINA

District Summary
Registration
Plan: 97 HOUSE/SENATE PLAN A

Date: 3/26/97
Time: 10:37 a.m.
Page: 1

Plan type: CONGRESSIONAL WITH 97 HOME SEATS

District Name	Total Reg.	White Reg.	Black Reg.	Other Reg.	Dem. Reg.	Repub. Reg.
District 1	271,673 100.00%	148,208 54.55%	121,958 44.89%	1,491 0.55%	235,336 86.62%	31,393 11.56%

District 2	262,713 100.00%	197,138 75.04%	64,603 24.59%	972 0.37%	188,416 71.72%	63,567 24.20%
District 3	213,448 100.00%	177,975 83.38%	34,801 16.30%	688 0.32%	148,801 69.71%	54,152 25.37%
District 4	315,782 100.00%	255,728 80.98%	55,959 17.72%	4,095 1.30%	200,635 63.54%	86,394 27.36%
District 5	295,332 100.00%	261,355 88.50%	33,380 11.30%	597 0.20%	172,461 58.40%	105,168 35.61%
District 6	290,562 100.00%	266,904 91.86%	22,935 7.89%	726 0.25%	143,304 49.32%	127,298 43.81%
District 7	273,584 100.00%	193,592 70.76%	61,670 22.54%	18,322 6.70%	200,676 73.35%	63,969 23.38%
District 8	233,898 100.00%	170,879 73.06%	58,907 25.18%	4,112 1.76%	160,694 68.70%	61,417 26.26%

District 9	295,719 100.00%	267,583 90.49%	27,125 9.17%	1,011 0.34%	153,291 51.84%	120,359 40.70%
District 10	300,037 100.00%	283,994 94.65%	15,676 5.22%	365 0.12%	139,665 46.55%	140,415 46.80%
District 11	319,610 100.00%	304,158 95.17%	13,108 4.10%	2,344 0.73%	188,349 58.93%	111,979 35.04%
District 12	277,525 100.00%	150,264 54.14%	126,488 45.58%	773 0.28%	197,783 71.27%	65,708 23.68%
Total	3,349,883 100.00%	2,677,778 79.94%	636,610 19.00%	35,496 1.06%	2,129,411 63.57%	1,031,819 30.80%

DB: NORTH CAROLINA

District Summary
Elections
Plan: 97 HOUSE/SENATE PLAN A

Date: 3/26/97
Time: 10:37 a.m.
Page: 1

Plan type: CONGRESSIONAL WITH 97 HOME SEATS

District Name	Senate Gantt	Senate Helms	Lt. Gov. Rand	Lt. Gov. Gardner	Court Lewis	Court Smith
District 1	84,590 53.28%	74,183 46.72%	97,349 61.83%	60,092 38.17%	101,516 69.66%	44,207 30.34%
District 2	77,449 47.00%	87,350 53.00%	82,802 51.02%	79,483 48.98%	80,919 54.34%	67,993 45.66%
District 3	53,362 41.53%	75,119 58.47%	62,499 46.85%	70,906 53.15%	65,828 53.48%	57,263 46.52%
District 4	116,953 58.79%	81,994 41.21%	104,429 53.36%	91,266 46.64%	91,593 52.33%	83,439 47.67%
District 5	71,185 39.17%	110,556 60.83%	88,395 45.71%	104,989 54.29%	82,168 46.53%	94,441 53.47%

District 6	65,644 37.47%	109,545 62.53%	73,141 41.17%	104,528 58.83%	63,286 37.99%	103,287 62.01%
District 7	75,154 48.26%	80,562 51.74%	91,897 57.23%	68,676 42.77%	87,320 58.70%	61,441 41.30%
District 8	64,574 47.40%	71,664 52.60%	76,221 55.44%	61,265 44.56%	69,792 55.29%	56,442 44.71%
District 9	79,462 44.75%	98,104 55.25%	72,891 40.95%	105,102 59.05%	60,368 38.22%	97,577 61.78%
District 10	69,023 37.37%	115,669 62.63%	77,694 40.03%	116,377 59.97%	73,264 39.30%	113,144 60.70%
District 11	86,212 45.93%	101,511 54.07%	94,396 47.13%	105,889 52.87%	91,924 48.91%	96,040 51.09%
District 12	107,333 66.49%	54,101 33.51%	93,441 62.08%	57,084 37.92%	85,103 61.54%	53,177 38.46%

Total	950,941 47.28%	1,060,363 52.72%	1,015,155 49.74%	1,025,657 50.26%	953,081 50.65%	928,451 49.35%

DB: NORTH CAROLINA — District Summary — Date: 2/20/97
Total Populations, All Ages — Time: 10:07 a.m.
Plan: 1992 CONGRESSIONAL BASE PLAN #10 — Page: 1
Plan type: Congressional Base Plan

District Name	Total Pop.	Total White	Total Black	Total Am. Ind.	Total Asian/PI	Total Other
District 1	552,386 100.00%	229,829 41.61%	316,290 57.26%	3,424 0.62%	1,146 0.21%	1,698 0.31%
District 2	552,386 100.00%	421,083 76.23%	121,212 21.94%	3,154 0.57%	4,077 0.74%	2,860 0.52%
District 3	552,387 100.00%	423,398 76.65%	118,640 21.48%	2,436 0.44%	4,044 0.73%	3,869 0.70%
District 4	552,387 100.00%	426,361 77.19%	111,168 20.13%	1,548 0.28%	10,602 1.92%	2,714 0.49%
District 5	552,386 100.00%	463,183 83.85%	83,824 15.17%	1,083 0.20%	2,448 0.44%	1,848 0.33%

District 6	552,386 100.00%	504,465 91.32%	41,329 7.48%	1,973 0.36%	3,489 0.63%	1,129 0.20%
District 7	552,386 100.00%	394,855 71.48%	103,428 18.72%	40,166 7.27%	5,835 1.06%	8,102 1.47%
District 8	552,387 100.00%	402,406 72.85%	128,417 23.25%	13,789 2.50%	4,232 0.77%	3,543 0.64%
District 9	552,387 100.00%	492,424 89.14%	49,308 8.93%	1,729 0.31%	7,373 1.33%	1,553 0.28%
District 10	552,386 100.00%	517,542 93.69%	30,155 5.46%	942 0.17%	2,238 0.41%	1,510 0.27%
District 11	552,387 100.00%	502,058 90.89%	39,767 7.20%	7,835 1.42%	1,791 0.32%	936 0.17%
District 12	552,386 100.00%	230,888 41.80%	312,791 56.63%	2,077 0.38%	4,891 0.89%	1,739 0.31%

Total	6,628,637 100.00%	5,008,492 75.56%	1,456,329 21.97%	80,156 1.21%	52,166 0.79%	31,501 0.48%

DB: NORTH CAROLINA — District Summary — Date: 2/20/97
Voting Age Population — Time: 10:07 a.m.
Plan: 1992 CONGRESSIONAL BASE PLAN #10 — Page: 1
Plan type: Congressional Base Plan

District Name	Total Vot. Age	Vot. Age White	Vot. Age Black	Vot. Age Am. Ind.	Vot. Age Asian/PI	Vot. Age Other
District 1	399,969 100.00%	181,933 45.49%	213,602 53.40%	2,428 0.61%	844 0.21%	1,110 0.28%
District 2	420,087 100.00%	328,676 78.24%	84,311 20.07%	2,173 0.52%	3,074 0.73%	1,963 0.47%
District 3	413,263 100.00%	324,808 78.60%	81,170 19.64%	1,755 0.42%	2,922 0.71%	2,608 0.63%

District 4	428,984 100.00%	336,850 78.52%	81,210 18.93%	1,239 0.29%	7,782 1.81%	1,903 0.44%
District 5	428,782 100.00%	364,886 85.10%	60,204 14.04%	822 0.19%	1,650 0.38%	1,221 0.28%
District 6	428,096 100.00%	393,271 91.87%	30,188 7.05%	1,433 0.33%	2,407 0.56%	798 0.19%
District 7	414,413 100.00%	306,754 74.02%	71,071 17.15%	26,489 6.39%	4,201 1.01%	5,898 1.42%
District 8	403,678 100.00%	305,366 75.65%	84,386 20.90%	8,699 2.15%	2,956 0.73%	2,271 0.56%
District 9	421,615 100.00%	380,364 90.22%	33,849 8.03%	1,275 0.30%	5,059 1.20%	1,069 0.25%
District 10	421,456 100.00%	397,476 94.31%	20,837 4.94%	700 0.17%	1,409 0.33%	1,036 0.25%

District 11	430,457 100.00%	396,064 92.01%	27,438 6.37%	5,126 1.19%	1,237 0.29%	592 0.14%
District 12	411,687 100.00%	186,115 45.21%	219,610 53.34%	1,529 0.37%	3,283 0.80%	1,150 0.28%
Total	5,022,487 100.00%	3,902,563 77.70%	1,007,876 20.07%	53,668 1.07%	36,824 0.73%	21,619 0.43%

DB: NORTH CAROLINA

District Summary
Registration
Plan: 1992 CONGRESSIONAL BASE PLAN #10

Date: 2/20/97
Time: 10:07 a.m.
Page: 1

Plan type: Congressional Base Plan

District Name	Total Reg.	White Reg.	Black Reg.	Other Reg.	Dem. Reg.	Repub. Reg.
District 1	270,229 100.00%	132,323 48.97%	136,536 50.53%	1,296 0.48%	235,445 87.13%	29,509 10.92%

District 2	270,061 100.00%	219,727 81.36%	48,153 17.83%	2,196 0.81%	190,564 70.56%	66,366 24.57%
District 3	248,318 100.00%	201,699 81.23%	45,684 18.40%	955 0.38%	173,132 69.72%	64,771 26.08%
District 4	306,226 100.00%	250,780 81.89%	53,212 17.38%	2,238 0.73%	191,876 62.66%	88,762 28.99%
District 5	293,437 100.00%	255,458 87.06%	37,427 12.75%	550 0.19%	178,786 60.93%	97,316 33.16%
District 6	292,842 100.00%	273,216 93.30%	18,907 6.46%	726 0.25%	145,337 49.63%	128,153 43.76%
District 7	218,613 100.00%	162,148 74.17%	38,413 17.57%	18,104 8.28%	154,517 70.68%	55,296 25.29%
District 8	254,082 100.00%	197,961 77.91%	52,140 20.52%	3,973 1.56%	166,645 65.59%	74,262 29.23%

District 9	296,124 100.00%	270,843 91.46%	24,125 8.15%	1,154 0.39%	148,223 50.05%	124,786 42.14%
District 10	297,917 100.00%	283,928 95.30%	13,611 4.57%	398 0.13%	135,660 45.54%	142,775 47.92%
District 11	318,958 100.00%	299,765 93.98%	16,847 5.28%	2,338 0.73%	192,259 60.28%	107,923 33.84%
District 12	283,076 100.00%	129,930 45.90%	151,555 53.54%	1,568 0.55%	216,967 76.65%	51,900 18.33%
Total	3,349,883 100.00%	2,677,778 79.94%	636,610 19.00%	35,496 1.06%	2,129,411 63.57%	1,031,819 30.80%

[This page intentionally left blank]

ATTACHMENT 97C-28F-4F(l), STATEMENT OF REPRESENTATIVE EDWIN MCMAHAN

HOUSE CONGRESSIONAL REDISTRICTING COMMITTEE DISCUSSION HOUSE FLOOR 3-26-97

Speaker Brubaker: For what purpose does the Gentleman from Moore arise.

Representative Morgan: Mr. Speaker, House Bill 586 - short title Congressional Redistricting 2 is placed on today's calendar.

Speaker Brubaker: Clerk will read.

Clerk: House Congressional Redistricting, Committee - House Committee Substitute for House Bill 586 - A bill to be entitled **AN ACT TO DIVIDE NORTH CAROLINA INTO TWELVE CONGRESSIONAL DISTRICTS.**

Speaker Brubaker: The Chair recognizes the Gentleman from Mecklenburg to explain the bill.

Representative McMahan: Mr. Speaker - Members of the House -

Eight weeks ago today I was appointed by Speaker Brubaker to chair the Congressional Redistricting Committee. At the time, I really didn't know what I was getting into, but today I must wonder what I did to the Speaker to deserve this punishment.

ATTACHMENT 97C-28F-4F(1), CONTINUED . . .

Seriously, I first want to thank the 25 Members of our Committee for their input and support. The Committee Substitute before you has received a favorable report from our Committee and does include the Plan agreed upon by the Senate Congressional Committee. So this Plan has been negotiated between both sides for the past eight weeks. It is not a perfect Plan, but we have tried very hard to agree upon a Plan that is based on geographic compactness, racial fairness, population that is homogeneously compatible, incumbency friendly, and would divide the fewest number of counties and precincts as possible. The Current Plan divides 45 Counties and 80 precincts - new Plan divides 22 Counties and only 2 Precincts.

I want to point out to each member that this Job has been made doubly hard because we received an ultimatum in 1992 to have a second Majority/Minority District, but last year our 12th District, as you know, was ruled unconstitutional. So the point I want to make is that we have tried to agree on a Plan that will be approved by the Justice Department and also be found constitutional.

As I said earlier, we don't have a perfect Plan, but I want you to compare it closely to our Current Plan that I have placed on your desk.

ATTACHMENT 97C-28F-4F(1), CONTINUED . . .

Starting in the West, please look at District 9, 10, 11 and see that we no longer divide Buncumbe, Henderson, Polk, McDowell, and Rutherford County.

The current Plan also has parts of District 5 extending into Burke, Caldwell and Wilkes County - our new Plan no longer splits those counties.

We also have now Cleveland and Gaston together in District 9 and not divided as in the Current Plan.

As you look at 12, we no longer extend from Gastonia to Durham - now only extends from Charlotte to Greensboro. We believe this District will now stand a Court test for the following reasons:

1. Not a Majority/Minority District now so shape does not create that - that was the basis the Court used to say this was unconstitutional - not an argument now.

2. Population in 12 has homogeneous interest - comprised of many citizens living in an urban setting.

3. Drawn to protect the Democratic incumbent.

All three factors are recognized as legitimate factors for drawing Congressional District Plans.

Not a great deal of change has occurred in District 8 except now we don't divide Moore County.

District 6 is also very similar - except it includes Moore County.

Moving East, a great deal of change and certainly improvement has occurred due to realigning District 1 - old map has District 1 really scattered over the entire Eastern North Carolina. Now we have a considerably more compact District 1 that still has over 50% of a minority population.

With the changes in District 1, we are now able to keep Columbus, Brunswick, New Hanover, Pender, Duplin and Onslow Counties together, and all in District 7 except Onslow, which is in District 3.

District 3 also more compact because it does not now come from the coast all the way into Sampson and Duplin County.

Now to the Triangle where we have caused the most controversy. If you look at the Current Map, you see how District 2 wraps around Wake County on the north and takes part of Durham County - now that District 12 from Charlotte no longer extends into Durham County, it certainly makes more sense to put Durham back together and combine it with Orange County and Chatham County -- counties already in District 4 -

than to either put it entirely in District 2 or extend District 1 down from N/E to pick up Durham County. When we pick up Durham County, it obviously causes us to divide Wake County, and the logical division in my opinion is to include the Research Triangle and Western Wake County in with Durham and Chapel Hill, and Eastern Wake County moves into District 2. This also makes more sense to me than the original Senate Plan that divides Wake on a more East/West line with North Wake County going into District 4 - and South Wake County, including Cary, moving into District 2. This seems to make sense not only for geographic compactness but also the makeup of the population certainly appears more homogeneous with the Triangle and 3 major Universities together. I regret that this has not made some of my good friends from Wake County happy, but I would like to point out that the other major counties, Guilford, Forsyth, and Mecklenburg, are all divided and represented by 2 Congressman and that is not all bad. Major metropolitan areas have a lot of needs unique to their area and having 2 Congressman working together for your county can be very positive.

So, to close, I ask each of you to look at what we have done as to a total Plan for our State - again, taking into consideration the directives we have from both the Justice Department, the Court, the incumbency issue and all the other factors. Please keep in mind all the many other factors we have had pulling on us in doing this job. Those of us involved have done our dead level best to agree on a Plan that both sides of

the aisle in each Chamber can support. Our alternative after next Tuesday will be to turn this matter over to the three judge panel to do our jobs. I am hopeful that we can forget the partisanship we may have on this issue and let's do this job that the Constitution directs us to do and not have to ask the Court to help us. I really don't think any of us want to send that kind of message to the citizens across North Carolina.

Please note that the bill also provides a back up plan that goes to 0% population variance if the Court should rule the Plan unconstitutional because of the very small variance we have between Districts. It will then divide 12 precincts in lieu of 2 to meet this requirement. Again, this is only in the event we need to go to 0% population, which most of us do not believe we will need to do.

Mr. Speaker, Representative Sutton will offer an Amendment that makes a slight change in Robeson County that has been agreed to by all parties. It had been agreed to earlier, but somehow got changed in the final Plan approved in Committee yesterday, and I apologize for that.

I understand that other Amendments will be offered and even though I want each Member offering an Amendment to know that I respect their reason for doing it. I must ask my fellow Members to please keep the Plan in tact. If one change is made, other than Representative Sutton, we will begin to unravel weeks of intense negotiations and agreements that have

happened in small steps along the way. Please understand that I can appreciate the reason for the Amendments being offered, but I must ask both sides to please defeat them to protect the integrity of the overall Plan so that we can get it approved in both bodies.

Thank you.

[This page intentionally left blank]

ATTACHMENT 97C-28F-4F(2), STATEMENT OF SENATOR ROY COOPER

VERBATIM TRANSCRIPT OF FLOOR DEBATE ON HB 586 (COMMITTEE SUBSTITUTE) CONGRESSIONAL REDISTRICTING SENATE CHAMBER THURSDAY, MARCH 27, 1997

Reading Clerk:

The Committee Substitute for HB 586, A BILL TO BE ENTITLED AN ACT TO DIVIDE NORTH CAROLINA INTO TWELVE CONGRESSIONAL DISTRICTS, referred to the Select Committee on Redistricting.

Senator Cooper: Mr. President.

President: The members will take their seats, the Senate will come to order. I believe you all might want to hear about this.

Senator Cooper: Mr. President.

President: Senator Cooper

Senator Cooper: To make an announcement.

President: The Senator may make his announcement.

Senator Cooper: Mr. President, the President Pro Tem will, hopefully before he walks out the door or maybe the Rules Chairman will, let us recess for fifteen (15) minutes to hold the Select Committee on Congressional Redistricting. It will be held in Room 1124, would ask you to please take your bill and your maps that are currently on your desks, take it down to the committee room with you. We don't have but a few extra copies and we would ask you to take it with you to the committee and then bring it back with you up to the floor so that we won't have to have additional copies made. We will do that right now as soon as you call a recess, Mr. President.

RECESS

President: Senator Cooper is recognized.

Senator Cooper: Mr. President, I would like to sent forth a committee report from the Select Committee on Congressional Redistricting.

President: The Senator may send forth his report. The clerk will read.

Reading Clerk: Senator Cooper, for the Redistricting Committee.

Committee Substitute for HB 586, A BILL TO BE ENTITLED AN ACT TO DIVIDE NORTH CAROLINA INTO TWELVE

CONGRESSIONAL DISTRICTS. The committee recommends the bill do pass.

Senator Cooper: Mr. President.

President: Senator Cooper is recognized for a motion.

Senator Cooper: Mr. President, I move that the rules be suspended to the end that the House Bill that was just read in be placed on the floor for immediate consideration.

President: You have heard the motion. Any discussion. If not, all in favor say "aye" opposed say "no." The Chair rules that's two-thirds (2/3). The clerk will read.

Reading Clerk: H.B. 586, A BILL TO BE ENTITLED AN ACT TO DIVIDE NORTH CAROLINA INTO TWELVE CONGRESSIONAL DISTRICTS, reported favorably.

President: Senator Cooper is recognized to explain the bill.

Senator Cooper: Thank you, Mr. President, members of the Senate. Today we have a congressional redistricting plan that splits forty-six (46) counties, that has six (6) counties which have three members of Congress, and which splits over eight (80) precincts. The plan we have today has some social merit. As a result of this plan, for the first time in many, many years, we have two minority members of Congress as a result

of the current plan. However, we have a plan that is a geographic mess. I have, for your viewing pleasure if you want to call it that, had placed on your desks a copy of the current map so that you can see how difficult it is for people to know in which Congressional district they reside. Last year, the United States Supreme Court ordered the Legislature to redraw the map as a result of the 12th Congressional District being declared unconstitutional. Now there are arguments for and against this decision. In fact, the Court found it close. It was a 5-4 decision and one of those Justices sort of wavered back and forth - Justice O'Connor. But the result was that the 12th District was held unconstitutional by a 5-4 decision and we were ordered by April 1 to come up with a new map. When this process began, we had a House controlled by the Republican Party and a Senate controlled by the Democratic Party and people were saying that it couldn't be done, that we could not reach an agreement. In fact, other states which had been ordered by the Court to redraw their plans under similar circumstances, other states have been unable to agree on a plan. I want to commend all of those who have been involved in this process because we have agreed on a plan - a plan that is fair and workable. You have the plan on your desk, it is entitled "97 House/Senate Plan A." This plan reduces the number of counties that are split from forty-five (45) to twenty-two (22). There are now only 22 counties split under this plan. It reduces the number of precincts split from over eighty (80) to two (2) and those two precincts have special circumstances with satellite annexations, etc. and are split under most other plans

as well. You have a plan which provides for geographic compactness, provides for consideration of community of interest, and provides for fair partisan balance. I think that all of the congressional districts would be competitive. However, it is likely that, if political fortunes remain the same, that we would end up with a plan that would elect six Democrats and six Republicans. We said from the beginning in the Senate that in 1996 the people made a decision to elect six members of Congress from the Democratic Party and six members of Congress from the Republican Party and we should not use court-ordered redistricting to alter that result. Therefore, we've come up with the plan that you see before you. In considering the plan, we looked at community of interest, looking at keeping precincts whole, at keeping counties whole as much as possible. We looked at making sure that no counties had more than two members of Congress representing the county. We looked at racial fairness. Let me tell you a little bit about the 1st and the 12th Districts because the unconstitutionality of the 12th District is the reason why we are here. You have the statistics on your desk, but the 1st District is majority minority, total population 50.27%.

However, let me emphasize that race was not the predominate factor in drawing the 1st Congressional District. We have a district that has ten whole counties and ten split counties. It's a district which respects the rural agrarian nature of the northeast. It is a district which, I believe, that a minority member of Congress or even a minority challenger would have

an excellent chance to be re-elected, but I believe the 1st District not only is constitutional, but also complies with the Voting Rights Act which is also a responsibility we have with this plan to have it pre-cleared by the Justice Department and held constitutional by the Courts. The 12th District is almost 47% majority minority. Currently, the 12th District under our current plan is majority minority. I believe that this new 12th District is constitutional for several reasons. First, and maybe most importantly, when the Court struck down the 12th District it was because the 12th District was majority minority and it said that you cannot use race as the predominate factor in drawing the districts. Well guess what! The 12th District, under this plan, is not majority minority. Therefore, it is my opinion and the opinion of many lawyers that the test outlined in Shaw vs. Hunt will not even be triggered because it is not a majority minority district and you won't even look at the shape of the district in considering whether it is constitutional. That makes an eminent amount of sense because what is the cut-off point for when you have the trigger of when a district looks ugly. I think that the court will not even use the shape test, if you will, on the 12th District because it is not majority minority. It is strong minority influence, and I believe that a minority would have an excellent chance of being elected under the 12th District. If, however, the court decides that the test is triggered for some reason and that we should look at the criteria outlined in Shaw vs. Hunt, you need to look at what the, how we have improved the shape of the 12th District. First, it is much more compact. It is 67% shorter in length than under the

old plan and you see how the old plan stretches from Gastonia to Durham. You can drive the length of this district in two hours. It is the third shortest district in the entire State. It covers six (6) counties instead of ten (10), it connects the metropolitan area of Charlotte and the metropolitan area of the Triad. There is certainly a community of interest along that corridor, economic, social, and otherwise. It is much wider and it takes into consideration the incumbent and political balance. For all of those reasons, I believe that the 12th District will be held constitutional. Members of the Senate, redistricting is a difficult process - I don't want this job again, but I believe that we have been able to overcome partisan politics and we have been able to reach a plan that is fair to the people of North Carolina, and fair to all involved. The House agrees. Yesterday, the House voted unanimously in favor of this plan - 87-30. Of those 87 members who voted "yes", 52 were Republicans and 35 were Democrats. That is a good strong bipartisan show of support for this plan. I believe that this plan is acceptable to all of the members of Congress. There are a couple who have stated objections about the way that some area had been moved around, but as far as the partisan nature of the districts is concerned, we have preserved the current partisan nature of each of the districts and for that reason, I think that all of the incumbents are satisfied. And let me emphasize to you that this is not an incumbent protection plan. This is a plan that attempts to preserve the partisan nature of each of the twelve districts as they now exist. I believe that we've done that with this plan. Members of the Senate, I encourage you to vote for

this plan. We have a responsibility as a legislature to draw a plan. It's easier politically to say "let the courts do it", but that's rolling the dice. Number one, you don't know what you are going to get and, number two, it is shirking our responsibility as representatives of the people to do what the Court has ordered us to do. We may not like everything about the plan, there are some parts of the plan that I wish I could change, but the process of negotiations require give and take. That's what has happened here. I think we have a result that is fair and equitable for all of the people of North Carolina and I encourage your "yes" vote. Thank you.

President: For what purpose does Senator Reeves arise?

Senator Reeves: To ask if Senator Cooper will yield.

President: He yields.

Senator Reeves: Senator Cooper, during your presentation of the plan over the last several weeks, did you have a chance to look at Plan 0 which we submitted to you for your review?

Senator Cooper: Yes. Senator Reeves is referring to a plan that both Senator Reeves and Senator Miller support which would keep Wake County whole and couple it with Chatham and Orange as the current 4th District is currently configured. They have pushed hard for that plan. We officially presented that plan to the House, it was summarily rejected. I believe that

if the Senate insisted upon that plan of keeping Wake County whole, that we would end up letting the federal courts draw this plan because they would not accept it.

Senator Reeves: In reviewing the order from the courts to redraw these districts, they keyed on District 12 and District 1. They did not mention District 4 or 2 as being a problem and, indeed, in my review, of the plan as we have it right now the base plan as it is set out, District 4 is not the problem. District 4 has two, almost two and one-half (2 ½) counties and now we are going to split the largest of those counties right down the middle. What is the rationale of the House and what is your rationale for making this fundamental change in District 4 and District 2.

Senator Cooper: The 12th District currently stretches from Gastonia to Durham. You necessarily have to change every single district in the state in order to rectify the unconstitutionality of the 12th District. Therefore, we had to make changes in all of the districts. If you were to keep Wake County whole under the current 4th District plan, the 2nd District would have to stretch almost completely around the 4th District in order to get enough population and you would end up having a situation where you would have almost a doughnut, with the 4th District being the middle of the doughnut and if we are looking at a plan that provides for geographic compactness, that's not one that I think that we should consider.

ATTACHMENT 97C-28F-4F(2), CONTINUED . . .

However, I presented it as an option and pushed for it at the instance of you and Senator Miller and we were not successful.

Senator Reeves: Thank you.

DEFENDANTS' MOTION TO STRIKE AFFIDAVITS FILED IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND MEMORANDUM IN SUPPORT OF MOTION

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
EASTERN DIVISION
Civil Action No. 4-96-CV-104-BO(3)

MARTIN CROMARTIE, THOMAS CHANDLER MUSE, and GLENNES DODGE WEEKS,
Plaintiffs.

v.

JAMES B. HUNT, JR., in his official capacity as Governor of the State of North Carolina, et al.,
Defendants.

MOTION TO STRIKE AFFIDAVITS FILED IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND MEMORANDUM IN SUPPORT OF MOTION

NOW COME the defendants, pursuant to Rule 56 of the Federal Rules of Civil Procedure, and move the Court to strike the affidavits of R.O. Everett, J.H. Froelich, Jr., Neil C. Williams, John Weatherly, and Lee Mortimer, which were filed

by plaintiffs in support of their motion for summary judgment.[1] The legal and factual grounds for this motion are set out below.

INTRODUCTION

On or about February 5, 1998, plaintiffs filed a motion and brief seeking summary judgment on their claim that the State's 1997 Congressional redistricting plan is an unconstitutional racial gerrymander. Plaintiffs contend that Districts 1 and 12 were drawn with a predominately racial motive and are tainted by the prior districts from the 1992 Congressional plan. In support of their claim, plaintiffs filed the affidavits of two plaintiffs who reside in District 12, R.O. Everett and J.H. Froelich, Jr., along with affidavits from three other citizens who do not live in the challenged districts, Neil C. Williams, John Weatherly and Lee Mortimer. The affidavits of these plaintiffs and interested citizens are rife with hearsay, speculation, personal opinions, and unsupported conclusions and beliefs which are not based on personal knowledge. For this reason the affidavits are not competent evidence to support plaintiffs' motion for summary judgment and must be struck.

---

[1] Plaintiffs also rely on these same affidavits to support their motion for preliminary injunction. For the same reasons they must be struck from consideration for summary judgment, these affidavits should carry no weight in deciding plaintiffs' motion for preliminary injunction.

ARGUMENT

An affidavit filed as evidence in a summary judgment proceeding "must present evidence in substantially the same form as if the affiant were testifying in court." *Evans v. Technologies Applications & Service Co.*, 80 F.3d 954, 962 (4th Cir. 1996). Federal Rule of Civil Procedure 56(e) specifically requires that affidavits supporting or opposing a motion for summary judgment "shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." *See Scosche Industries, Inc. v. Visor Gear, Inc.*, 121 F.3d 675, 681 (Fed. Cir. 1997). In evaluating evidence concerning a summary judgment motion, "a court may not consider affidavits that do not satisfy the requirements of Fed. R. Civ. P. 56(e)." *El Deeb v. University of Minn.*, 60 F.3d 423, 429 (8th Cir. 1995).

AFFIDAVITS OF EVERETT, FROELICH AND WILLIAMS

The affidavits of Everett, Froelich and Williams are inadmissible conclusory expressions of personal beliefs and lay opinions and are not competent evidence for purposes of deciding a summary judgment motion. Everett offers testimony that he "perceive[s]" that the shape of District 12 in the 1992 plan was predominantly motivated by race and also his lay opinion that the shape of District 12 in the 1997 plan is still a racial gerrymander motivated predominately by race. Everett, a local businessman from Rowan County who had no involvement in the legislature's redistricting process, also speculates that the boundaries would have been quite different

if race-neutral principles such as compactness, contiguity, and political subdivisions had been followed. Similarly, Froelich, a businessman from Guilford County who had no involvement in the legislature's redistricting process, offers his personal belief that apart from a racial motive, no one could justify putting Mecklenburg and Guilford Counties in the same district. He further speculates that based on race-neutral redistricting principles all of Mecklenburg County would be in one district, while all of Guilford County would be in another district. The Williams affidavit offers similar incompetent testimony. Williams, a lawyer and local politician from Mecklenburg County who lost the Republican primary in 1994 in District 9, also had no involvement in the legislature's redistricting process. However, he offers his personal belief that it "is apparent" that racial motives predominated in creating District 12 and speculates that using traditional redistricting principles of compactness, contiguity and respect for political subdivisions and actual communities of interest, all of Mecklenburg County would be in a single district. Finally, he offers his legal conviction that District 12 is the "fruit of the poisonous tree."

As a matter of law, such conclusory and speculative statements of belief are insufficient to support summary judgment on the issue of whether race was the predominate factor motivating the legislature's redistricting decision. "[O]nly statements 'made on personal knowledge' will support a motion for summary judgment; statements of mere belief

must be disregarded." *Tavery v. United States*, 32 F.3d 1423, 1435 (10th Cir. 1994) (quoting *Automatic Radio Mfg. Co. v. Hazeltine Research*, 339 U.S. 827, 831, 70 S. Ct. 894, 896, 94 L. Ed. 1312 (1950)). *See also Jameson v. Jameson*, 176 F.2d 58, 60 (D.C. Cir. 1949) ("Belief, no matter how sincere, is not equivalent to knowledge."); *Carey v. Beans*, 500 F. Supp. 580, 583 (E.D. Pa. 1980) (on summary judgment, statements prefaced by the phrases "I believe" or those made upon an "understanding" are properly subject to a motion to strike). Because personal knowledge is the necessary foundation for lay testimony, "affidavits composed of hearsay and opinion evidence do not satisfy Rule 56(e) and must be disregarded." *Scosche Industries*, 121 F.3d at 681 (citing *State Mut. Life Assurance Co. of Am. v. Deer Creek Park*, 612 F.2d 259, 264-65 (6th Cir. 1979) and *Rossi v. Trans World Airlines, Inc.*, 507 F.2d 404, 406 (9th Cir. 1974)). Similarly, "[s]peculation does not meet a party's burden" in a summary judgment proceeding and "[f]acts, not [a plaintiff's] perceptions and feelings, are required." *Uhl v. Zalk Josephs Fabricators, Inc.*, 121 F.3d 1133, 1137 (7th Cir. 1997).

The lay witness testimony offered by plaintiffs is not probative or competent evidence. The "gauzy generalities" of the affidavits offered by plaintiffs, which are "apparently based on something less than personal knowledge," prove nothing and "are not entitled to weight in the summary judgment balance." *Cadle Co. v. Hayes*, 116 F.3d 957, 961 (1st Cir. 1997). *See also Baker v. Latham Sparrowbush Assocs.*, 72

F.3d 246, 255 (2nd Cir. 1995) (allegation made solely upon information and belief without any supporting evidentiary facts could not be considered on motion for summary judgment); *U.S. for Use and Ben. of Conveyor Rental & Sales Co. v. Aetna Cas. & Sur. Co.*, 981 F.2d 448, 454, (9th Cir. 1992) (affidavit was inadmissible as evidence on summary judgment motion absent requisite personal knowledge of affiant). Evidence submitted in summary judgment affidavits must be based on personal knowledge and cannot be conclusory. *Evans*, 80 F.3d at 962. Because "self-serving opinions without objective corroboration [are] not significantly probative, the decision to strike and disregard as irrelevant" is proper. *Id.* In the instant case, the affidavits of Everett, Froelich and Williams consist of conclusory statements predicated on personal beliefs unsupported by objective facts. For these reasons, the affidavits must be struck by this Court pursuant to Rule 56(e).

AFFIDAVIT OF JOHN WEATHERLY

Representative John Weatherly is the current representative from House District 48 and previously served in the North Carolina House of Representatives in the 1989, 1993 and 1995 sessions. Although he served on an Election Laws Reform Committee in 1996, and unsuccessfully introduced a bill in 1997 to establish a redistricting commission, he did not serve in the General Assembly when the 1992 Congressional plan was enacted and was not a member of the House Committee on Congressional Redistricting during the 1997 session when the current redistricting plan was enacted. *See*

Bartlett Aff., Vol. IV at 97C-28F-3B, p. 3. Representative Weatherly's only link to the redistricting process was an appearance at the Public Hearing held by the General Assembly's Congressional Redistricting Committees on February 26, 1997, to speak in support of his bill to create a redistricting commission. (Weatherly's Commission bill was never enacted by the General Assembly.) Weatherly took this opportunity to criticize the proposed Senate and House redistricting plans presented at the public hearing on the grounds that they were designed for the primary purpose of protecting the interests of incumbents and political parties. *See* Bartlett Aff., Vol. IV at 97C-28F-3B, pp. 38-40. There was no suggestion in his public comments that Districts 1 and 12 were racial gerrymanders or that race was the predominant motive in the creation of these two districts.

Although he had no participation in the redistricting process other than appearing at the public hearing and casting a vote against the plan (Bartlett Aff., Vol. V at 97C-28F-4H at House Roll Call Vote #196), Representative Weatherly concludes in his affidavit that race predominated in determining the boundaries of Districts 1 and 12, and with no supporting evidence expresses his opinion that the General Assembly acted under a premise that two Congressional districts should be created to assure the election of African-Americans, specifically the incumbent African-Americans. He also expresses his conviction that the only conceivable motive for linking Mecklenburg with Guildford and Forsyth Counties

in a Congressional district was the racial motive of guaranteeing the election of an African-American. He further expresses his belief that the same racial motivation applied to the creation of District 1. Representative Weatherly candidly admits in his affidavit that his opinions and conclusions are not based on personal knowledge, but are based on hearsay--"statements made on or off the floor of the General Assembly or in Committee, on the final results of the redistricting process, and on [his] experience as a legislator." Weatherly Aff. at 4.

Representative Weatherly's beliefs and conclusions on the motivations behind the drawing of current Districts 1 and 12 are not competent admissible evidence. *See* discussion above at pp. 4-5, regarding the inadmissibility of conclusory statements of personal belief. In addition, "hearsay evidence, which is inadmissible at trial, cannot be considered on a motion for summary judgment." *Maryland Highway Contractors' Ass'n., Inc. v. State of Maryland*, 933 F.2d 1246, 1251-52 (4th Cir. 1991). *See also Miller v. Solem*, 728 F.2d 1020, 1026 (8th Cir. 1984) (affidavits containing hearsay statements failed to comply with Rule 56(e) requirements); *Pan-Islamic Trade Corp. v. Exxon Corp.*, 632 F.2d 539, 556 (5th Cir. 1980) (hearsay evidence in Rule 56 affidavits is entitled to no weight); *Blair Foods, Inc. v. Ranchers Cotton Oil*, 610 F.2d 665, 667 (9th Cir. 1980) (hearsay evidence is inadmissible and may not be considered by this court on review of a summary judgment). Representative Weatherly's inadmissible affidavit

"is very nearly entirely conclusory and devoid of specific facts to support his opinion." *Rohrbough v. Wyeth Labs., Inc.*, 916 F.2d 970, 975 (4th Cir. 1990). In addition, given the conflict between his conclusory affidavit alleging a predominant racial motive and his public statement criticizing the primary motive of protecting incumbents and political parties, the Court may disregard the affidavit. *Id.*

Finally, Representative Weatherly's affidavit is inadmissible to prove the legislature's motivation in enacting the 1997 Congressional plan and must be struck. It is a long standing rule of law in North Carolina that the affidavit or testimony of a member of the legislature may not be relied upon to prove legislative intent. *D & W, Inc. v. City of Charlotte*, 268 N.C. 577, 581-82, 151 S.E.2d 241, 244 (1966). A statute "is an act of the legislature as an organized body" and it "expresses the collective will of that body" so that the understanding of a single member may not be accepted by the Court to ascertain the legislative intent. *Id. See also Milk Comm'n v. National Food Stores*, 270 N.C. 323, 332-33, 154 S.E.2d 548, 555 (1967) (testimony or affidavits of members of the legislature are not competent evidence of legislative intent and must be disregarded). Because North Carolina law provides that the affidavit of an individual member of the General Assembly is inadmissible and cannot be relied upon to prove legislative intent, the affidavit of Representative Weatherly attempting to establish the legislature's motive in drawing Districts 1 and 12 must be struck. *Empire Distribs. of*

N.C. v. Schieffelin & Co., 679 F. Supp. 541 (W.D.N.C. 1987). For all the foregoing reasons, this Court must disregard the affidavit of Representative Weatherly.

AFFIDAVIT OF LEE MORTIMER

Lee Mortimer, a self-professed expert on proportional representation, is a technical writer in the Research Triangle Park who has previous experience as a journalist. His educational background consists of an undergraduate degree from Western Carolina University in history with a minor in political science. As an active proponent of proportional representation, a representational theory irrelevant to Congressional elections, Mortimer purports to be qualified to provide expert testimony on the Congressional redistricting process in North Carolina. He had no involvement in and has no personal knowledge of the legislature's Congressional redistricting process. Mortimer's views on the motivation of the General Assembly and its leadership in drawing the 1997 Congressional plan are not based on any personal knowledge and his affidavit does not show affirmatively that he is competent based, on education, experience. or other training, to testify as an expert to the matters stated therein.

Despite an absence of qualifications to testify as an expert under Federal Rule of Evidence 702, Mortimer offers testimony consisting of a string of lay opinions:

- "in my opinion" the severe misshapenness indicates race predominated in determining District 1's boundaries.

- "So, in my opinion" it is clear from the resemblance to the previous districts that Districts 1 and 12 are the "fruit of the poisonous tree."

- "I believe" the new Districts 1 and 12 would never have been drawn with their present boundaries "except for race."

- "I can see no legitimate basis" for the way the minority communities were grouped together.

- "In my opinion" District 12 is a make over of the old unconstitutional district.

- "I believe" it is the process used to reach a result that "indicates" a racial intent.

- "In my opinion" the only explanation for disregarding the objective to maintain intact counties and municipalities is that such an objective undermined and conflicted with the predominate objective of maximizing the district's black population.

- "In my opinion" the inclusion of some minimum number of intact counties is an

important test of whether the district is raced-based.

- "It appears to me" District 12 has no intact counties because race was the predominant consideration.

- "I believe" the common characteristics test is a common sense criteria applied in redistricting cases to determine whether race predominated in drawing a district.

- "It is clear to me" that the option of drawing separate districts using Mecklenburg and Guildford Counties was not considered because it would not produce a district that had more than a 29 percent minority population.

See generally Mortimer Aff. at 3-9.

To be admissible, expert testimony must consist of scientific, technical, or other specialized knowledge that will assist the trier of fact to understand the evidence or to determine a fact in issue. *See*, Rule 702, Federal Rules of Evidence.

> [T]he plain language of the Rules maintains some limitations on expressions of opinion. Lay opinions must be "rationally based on the perception of the witness," Fed. R. Evid. 701,

> and, only experts qualified by "knowledge, skill, experience, training or education" may submit an opinion. Fed. R. Evid. 702.

Thomas J. Kline, Inc. v. Lorillard, Inc., 878 F.2d 791, 799 (4th Cir. 1989). Although the Federal Rules of Evidence have generally relaxed traditional barriers to expert opinion testimony, the Supreme Court has emphasized that Rule 702 "clearly contemplates some degree of regulation of the subjects and theories about which an expert may testify." *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 589, 113 S. Ct. 2786, 2795, 125 L. Ed. 2d 469, 480, (1993). In particular, the Court observed that Rule 702 permits an expert to testify only when "scientific, technical, or other specialized *knowledge will assist the trier of fact*," and that "the word 'knowledge' connotes more than subjective belief or unsupported speculation." *Id.* at 589-90, 113 S. Ct. at 2795, 125 L. Ed. 2d at 480-81.

Expert opinion is admissible as evidence in a summary judgment proceeding "only where it appears that the *affiant* is competent to give an expert opinion." *Garside v. Osco Drug, Inc.*, 895 F.2d 46, 50 (1st Cir. 1990). A witness who lacks an appropriate educational background and lacks any training or other experience in the area of testimony is not qualified under Rule 702 as an expert witness. *See Thomas J. Kline*, 878 F.2d at 799-800 (witness who was not an economist, whose highest level of education was a masters degree in business administration, who had published only one article on an

unrelated topic, and who had no relevant work experience. was not qualified to testify as expert on credit decisions); *Doddy v. Oxy USA, Inc.*, 101 F.3d 448, 459 (5th Cir. 1996) (witness qualified to testify as an expert on procedures for treating oil and gas wells for corrosion not qualified to testify on issues related to chemical content and toxicity which were matters not within his field of expertise). To allow a witness to testify to matters beyond his expertise or of which he has no personal knowledge "would tend to mislead the jury by having an 'expert' testify to matters that are not within his field." *Doddy*, 101 F.3d at 459.

In the instant case, Mortimer has laid no foundation supporting his self-serving description of himself as an expert on redistricting. The affidavit on its face shows he lacks the relevant educational background, experience or other training to qualify as such an expert, and his various personal opinions and beliefs are inadmissible lay testimony which should not be considered by the Court. *See* discussion above at pp. 4-5, regarding the inadmissibility of conclusory and unsupported lay witness personal opinions and beliefs.

In addition to offering his various personal opinions and beliefs, Mortimer also attempts to offer expert testimony on the minimum percentage of black voting-age population needed in a Congressional district in North Carolina to achieve what he deems an equal electoral opportunity as a matter of law. *See* Mortimer Aff. at 9-17. Not only is Mortimer unqualified to

offer this particular analysis and legal conclusion, but he attempts to support his lay opinion by attaching to his affidavit a theoretical article on black representation by two political scientists. The inappropriateness of Mortimer's testimony on a theory of equal electoral opportunity for minorities arises not only from his lack of competence to present the theory, but also from the unvalidated nature of the theory itself. In order for expert testimony to be properly admitted, it must meet a two part test: (1) the expert testimony must consist of knowledge that is supported by appropriate validation; and (2) "the evidence or testimony must 'assist the trier of fact to understand the evidence or to determine a fact in issue.'" *Daubert*, 509 U.S. at 590-91, 113 S. Ct. at 2795, 125 L. Ed. 2d at 481. To determine whether certain expert evidence properly satisfies the first prong of the test, trial courts must consider whether the theory used by the expert can be, and has been, tested; whether the theory has been subject to peer review and publication; the known or potential rate of error of the method used; and the degree of the method's or conclusion's acceptance within the relevant scientific community. *Id.* at 593-94, 113 S. Ct. at 2796-97, 125 L. Ed. at 483. Even if testimony meets the first prong of the test, the Supreme Court has warned that in determining whether evidence meets the second prong of the test, judges must be mindful of other evidentiary rules which permit the exclusion of evidence when its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues or misleading the jury:

> Expert evidence can be both powerful and quite misleading because of the difficulty in evaluating it. Because of this risk, the judge in weighing possible prejudice against probative force under Rule 403 of the present rules exercises more control over experts than over lay witnesses.

Id. at 595, 113 S. Ct. at 2798, 125 L. Ed. 2d at 484 (citations omitted). *See U.S. v. Dorsey*, 45 F.3d 809 (4th Cir. 1995) (no error to exclude testimony where the evidence offered did not meet either prong of the *Daubert* test).

In the case of Mortimer's affidavit, the affiant lacks knowledge or expertise regarding the methodology employed by the political scientists in devising a formula to calculate the minimum percentage of minorities theoretically necessary to assure an equal electoral opportunity. Although Federal Rule of Evidence 703 permits *experts* to rely on hearsay, this exception to the usual hearsay rules is allowed "because the expert's 'validation, expertly performed and subject to cross-examination, ought to suffice for judicial purposes.' " *Tk-7 Corp. v. Estate of Barbouti*, 993 F.2d 722, 732 (10th Cir. 1993) (quoting Rule 703, *Advisory Committee Notes*). However, that rationale is not satisfied where the so-called "expert" fails to demonstrate any basis for concluding that another individual's opinion on a subject is reliable, and where the so-called "expert" lacks familiarity with the methods and reasons underlying the other individual's projections, thereby

precluding any assessment of the validity of the projections through cross-examination. *Id.* It is the Court's duty to "make sure that the expert isn't being used as a vehicle for circumventing the rules of evidence." *In re James Wilson Assocs.*, 965 F.2d 160, 173 (7th Cir. 1992). "Scrutiny of expert testimony is especially proper where it consists of 'an array of figures conveying a delusive impression of exactness in an area where a [fact finder's] common sense is less available than usual to protect it.' " *Eastern Auto Distributors, Inc. v. Peugeot Motors of Am., Inc.*, 795 F.2d 329, 338 (4th Cir. 1986) (quoting *Herman Schwabe, Inc. v. United Shoe Mach. Corp.*, 297 F.2d 906, 912 (2d Cir. 1962)). The affiant Mortimer has not, and cannot, establish his qualification to offer expert testimony on a political science electoral theory; nor can he offer any expertise or knowledge to validate the electoral theory and projections of other persons on whom he relies as required by Rule 702. Under these circumstances, the testimony on election projections is inadmissible and Mortimer's affidavit cannot be relied on by the Court.

Finally, Mortimer also improperly cites to hearsay within hearsay from various newspaper articles, in addition to an article from the American Political Science review, to support his testimony. *See* Mortimer Aff. at 3 n.1, 6 n.2, 10 n.4, 11 (Exhibit B), and 13 (Exhibits C& D). Newspaper accounts of events are inadmissible hearsay, and their accounts of people's statements are hearsay within hearsay. *Horta v. Sullivan*, 4 F.3rd 2, 8 (1st Cir. 1993). *See also Mayor v.*

Educational Equality League, 415 U.S. 605, 618 n. 19, 94 S. Ct. 1323, 1332 n.19, 39 L. Ed. 2d 630, 643 n.19 (1974); *New England Mut. Life Ins. Co. v. Anderson*, 888 F.2d 646, 650-51 (10th Cir. 1989). Such hearsay evidence is inadmissible at trial and "cannot be considered on a motion for summary judgment." *Maryland Highway Contractors' Ass'n, Inc.*, 933 F.2d at 1251-52.

CONCLUSION

Plaintiffs have moved for summary judgment and defendants have cross-moved for summary judgment. Summary judgment is appropriate unless plaintiffs produce evidence that is sufficient to establish a reasonable probability of the existence of the essential elements of their claims. *Autry v. N.C. Dept. of Human Resources*, 820 F.2d 1384, 1386 (4th Cir. 1987); *Lovelace v. Sherwin-Williams*, 681 F.2d 230, 242 (4th Cir. 1982). Federal Rule of Civil Procedure 56(e) also demands that affidavits supporting or opposing a motion for summary judgment be made on personal knowledge, set forth facts admissible in evidence and show affirmatively that the affiant is competent to testify to the matters contained in the affidavit. Federal Rule of Evidence 702 requires that only experts qualified by knowledge, skill, experience, training or education are competent to give expert opinions. *Thomas J. Kline, Inc.*, 878 F.2d at 799. The five affidavits offered by plaintiffs fail to meet these basic requirements, and they must be struck and disregarded by the Court in determining the parties' summary judgment motions.

This the 2nd day of March, 1998.

MICHAEL F. EASLEY
ATTORNEY GENERAL

/s/ Edwin M. Speas, Jr.
Senior Deputy Attorney General
N.C. State Bar No. 4112

/s/ Tiare B. Smiley
Special Deputy Attorney General
N. C. State Bar No. 7119

/s/ Norma S. Harrell
Special Deputy Attorney General
N.C. State Bar No. 6654

N.C. Department of Justice
P.O. Box 629
Raleigh, N.C. 27602
(919) 716-6900

[Certificate of Service omitted in printing]

[This page intentionally left blank]

AFFIDAVIT OF ROBINSON O. EVERETT (WITHOUT ATTACHMENT) (CD 56)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
RALEIGH DIVISION
Civil Action No. 4.96-CV-104-BO(3)

MARTIN CROMARTIE, *et al.*, Plaintiffs,	)
vs.	)
JAMES B. HUNT, JR., in his official capacity as Governor of the State of North Carolina, *et al.*, Defendants.	)

AFFIDAVIT OF ROBINSON O. EVERETT

Robinson O. Everett, being duly sworn, deposes and declares as follows:

I am an attorney for the plaintiffs in this case; and previously I was a plaintiff in the *Shaw v. Hunt* litigation and also represented myself and my co-plaintiffs in that case at trial and on appeal. I was present during the entire trial that commenced late in March, 1994; and I cross-examined some of the defendants' witnesses in that case. One of those whom I cross-examined was Gerry Cohen, who had played a major role in the preparation of the 1992 congressional redistricting plan. Attached to this affidavit are pages 627-629 of the transcript of the trial, wherein is contained a portion of his trial testimony in

which I cross-examined him about an earlier deposition which he had given. As reflected in the attached pages of the transcript, he reaffirmed his earlier deposition testimony that 95% of the African-Americans registered to vote in "urban areas" in North Carolina were registered as Democrats and 97-98% in "rural areas" were registered as Democrats. During the trial I also cross-examined Representative Melvin Watt, Congressman from the Twelfth District; and as reflected in the attached pages 981-983 of the transcript. I questioned him about the estimated percentage of registration of African-Americans as Democrats. His opinion in that regard, as reflected in the attached transcript, was similar to Mr. Cohen's opinion that 95% or higher of the African-Americansregistered to vote in North Carolina are registered as Democrats. I do not recall any evidence given during the discovery process or at trial in *Shaw v. Hunt* that was inconsistent with the testimony of Cohen and Watt.

Further affiant sayeth not.

/s/ Robinson O. Everett

Subscribed and sworn to before me
this 23rd day of March, 1998.

/s/ Anita Robinson
Notary Public
My Commission expires: 10-28-2002

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
EASTERN DIVISION
Civil Action No. 04-CV-104-H2

MARTIN CROMARTIE, et. al.	)
Plaintiffs,	)
	)
vs.	)
	)
JAMES B. HUNT, JR.	)
Defendant.	)

DECLARATION OF DR. RONALD E. WEBER

I. Ronald E. Weber, Ph.D., declare pursuant to 28 U.S.C. 1746 as follows:

1. I am currently the Wilder Crane Professor of Government in the Department of Political Science at the University of Wisconsin, Milwaukee, Wisconsin; President of Campaign and Opinion Research Analysts, Inc.; former co-editor of *The Journal of Politics* and Chairman of the Department of Political Science at the University of Wisconsin. Milwaukee; and former Fulbright Commission John Marshall Professor of Political Science at the Budapest University of Economic Sciences and the Central European University. Budapest. Hungary (1996-97). I received my B.A. in Political Science and History from Macalester College, St. Paul, MN. in

1964 and a Ph.D. in Political Science from Syracuse University in 1969, with specialties in American state politics, voting behavior, and quantitative analyses of political data. A copy of my curriculum vitae is attached as Exhibit A.

2. I am the author of numerous scholarly works on state political behavior, including several works on state legislative elections and voting behavior at the individual and aggregate levels of analysis. These works have appeared in such academic journals as the *American Political Science Review*, *The Journal of Politics*, *Midwest Journal of Political Science*, *Public Opinion Quarterly*, *American Politics Quarterly*, and *Legislative Studies Quarterly*.

3. I have been retained as a consultant and expert witness in a number of redistricting and voting rights cases and have been qualified as an expert by the U.S. District Courts in the Middle District (Northern and Southern Divisions) of Alabama, the Northern District (Tallahassee Division) and Middle District (Jacksonville Division) of Florida, the Southern District (Augusta Division) of Georgia, the Northern District (Eastern Division) of Illinois, the Eastern, Middle, and Western Districts of Louisiana, the District of Maryland, the District (Western Division) of Massachusetts, the Eastern District (Southern Division) of Michigan, the Northern District (Eastern and Western Divisions) of Mississippi, the Eastern District (Eastern Division) of Missouri, the District of Nebraska, the Southern District of New York, the Northern (Dallas Division),

Southern (Houston Division), and Western (Austin Division) Districts of Texas, the Eastern District of Virginia (Richmond Division), and the Eastern District of Wisconsin. I have given testimony by deposition in a number of cases, including a deposition for the plaintiffs in the Congressional redistricting case of *Shaw v. Reno*, n/k/a *Shaw v. Hunt* (Eastern District of North Carolina, Raleigh Division). I have testified in a number of Congressional and state legislative redistricting cases, including *Johnson v. Miller* (Southern District of Georgia, Augusta Division), *Vera v. Richards* (Southern District of Texas, Houston Division), *Hays v. State of Louisiana* (Western District of Louisiana, Shreveport Division), *Johnson v. Mortham* (Northern District of Florida, Tallahassee Division), *Moon v. Meadows* (Eastern District of Virginia, Richmond Division), *DeGrandy v. Wetherell* (Northern District of Florida, Tallahassee Division), *NAACP v. Austin*, (Eastern District of Michigan, Southern Division), and *Thomas v. Bush*, (Western District of Texas, Austin Division). A full listing of the cases in which I have testified in Federal court or I was deposed under oath is attached as Exhibit B. I also have extensive experience developing redistricting plans for local and state government clients and assisting them with preclearance of those plans under Section 5 of the U.S. Voting Rights Act of 1965, as amended in 1982.

4. I have been retained by plaintiffs in this case and am being compensated at the rate of $125 per hour plus out-of-pocket expenses. Neither the amount of my compensation nor

the fact that I am being compensated has altered the opinions that I have given and will give in this declaration and case.

5. I address the following questions in analyzing whether the 1997 U.S. Congressional redistricting in North Carolina results in a violation of the Fourteenth and Fifteenth Amendments of the U.S. Constitution in accord with factors set forth by the U.S. Supreme Court in *Shaw v. Reno*, *Miller v. Johnson*, *Shaw v. Hunt*, and *Bush v. Vera*:

(1) whether race was the predominant factor used by the state of North Carolina to draw the boundaries of the 1997 U.S. Congressional districts;
(2) whether the state of North Carolina in creating the U.S. Congressional districting plan subordinated traditional race-neutral districting principles, such as compactness, contiguity, respect for political subdivisions or communities defined by actual shared interests, to racial considerations;
(3) whether the African-American voting age population anywhere in North Carolina is sufficiently large and geographically concentrated enough to constitute a potential voter majority using traditional districting principles to draw a single-member Congressional district; and
(4) whether the majority-minority U.S. Congressional Districts 1 and 12 in the 1997 North Carolina plan is overly safe from the standpoint of giving a candidate of

choice of African-American voters an opportunity to be elected, thus questioning whether the plan was narrowly tailored to satisfy a compelling state interest.

6. The results of my analysis to date will be presented in this declaration in the following form: in Section I, I will outline briefly the history of Congressional districting in North Carolina since 1960; in section II, I will describe the analyses conducted to answer the first two questions and set forth my conclusions on those questions; in section III, I will describe the analyses conducted to answer the third question relating to size and concentration of African-American voters in North Carolina; and in section IV, I will discuss the electoral safeness of North Carolina Congressional districts 1 and 12. Tables, charts, and exhibits relevant to my analyses will be included within the body of the declaration or as attachments to this declaration.

FINDINGS

I. HISTORY OF RECENT CONGRESSIONAL REDISTRICTINGS IN NORTH CAROLINA

7. Following the 1960 Census of Population, the U.S. Congress in apportioning Congressional seats among the states decreased the size of the North Carolina Congressional delegation from 12 to 11 seats. Thus, the North Carolina General Assembly redistricted the state into a total of 11 districts in time for use in the 1962 elections. In this plan not

a single county was split across two Congressional districts. This plan was used in the 1962 and 1964 elections.

8. Following the U.S. Supreme Court decision in *Wesberry v. Sanders* (1964), the North Carolina Congressional districting plan was challenged in Federal court. A three-judge Federal panel held the plan unconstitutional in 1965 and ordered the North Carolina General Assembly to enact a constitutional Congressional districting plan by Jan. 31, 1966 (*Drum v. Sewell*, ___ F.Supp ___, M.D.N.C., 1965). The court order spurred the North Carolina General Assembly to redraw the Congressional districts in early 1966, reducing some population disparities among the districts. This plan, which the Federal court accepted only for use as an interim plan for use in the 1966 primary and general elections, did not split a single county in reducing the population disparities. The Federal Court ordered that the General Assembly adopt another plan by July 1, 1967 to further reduce the population disparities in the plan of January of 1966. A third Congressional districting plan for the 1960s was adopted by the North Carolina General Assembly on July 3, 1967 and received Federal Court approval later that month. Again, the General Assembly was able to achieve a plan that reduced population disparities while not splitting any counties. This plan was used in the 1968 and 1970 elections.

9. Based on the 1970 Census of Population, the 11 Congressional districts of North Carolina were out of balance

in population and the General Assembly had to adjust the populations of the 11 districts before the 1972 elections. In 1971, the General Assembly adopted a plan that did not divide any county and had a maximum population deviation of 3.8 percent. These districts were used in the elections of 1972-1980.

10. As was true following the 1970 Census of Population, the 1980 Census of Population revealed that the 11 districts of the 1970s were out of population balance. Thus, the North Carolina General Assembly had to adjust the populations of the 11 districts before the 1982 elections. The first plan adopted in July, 1981 did not receive pre-clearance under Section 5 by the U.S. Department of Justice. The General Assembly followed-up with a revised plan that satisfied the Department of Justice's objections in a special session of February, 1982. For the first time in the modern history of North Carolina, it was necessary to split four counties in order to balance the populations across the districts. Avery, Johnston, Moore, and Yadkin counties were each split across two districts. The town of Chapel Hill as well as the city of High Point were each split across two districts owing to the fact that those two places cross county lines and the General Assembly decided to draw the Congressional districts using county lines between Orange and Durham counties and between Guilford and Randolph counties. These 11 districts were used in the elections of 1982-1990.

11. The population of the state of North Carolina grew more rapidly than the U.S. as a whole between 1980 and 1990, and thus the Congressional apportionment following the 1990 Census of Population allocated an additional seat to North Carolina, bringing the size of the Congressional delegation back to 12 seats as it had been in the 1950s. I will not recount the history of General Assembly action in the early 1990s on Congressional districting as that has been extensively discussed in *Shaw v. Reno* (113 S.Ct. 2916, 1993) and *Shaw v. Hunt* (861 F. Supp 408, E.D.N.C., 1994; 116 S.Ct. 1894, 1996). Suffice it to say that the Congressional districting plan of the 1990s which was used in the 1992 and 1994 elections was invalidated by the *Shaw* challenge. The 1996 election was also held using these districts as the North Carolina General Assembly was given until the 1997 regular session to redraw the Congressional districts. The 1997 plan of the North Carolina General Assembly is under challenge in this action.

13. I conclude this section by making several observations. First, the sub-dividing of counties to achieve equally populated Congressional districts in North Carolina is a relatively recent occurrence, taking place for the first time with the splitting of just four counties in the early 1980s. Second, no county in North Carolina is large enough that it must of necessity be sub-divided to comply with the principle of "one-person, one-vote". Mecklenburg County, the largest county in population in North Carolina, is slightly smaller than a current Congressional district. Third, as a matter of principle

the number of counties that would need to be sub-divided to comply with "one-person, one-vote" is N-1 the number of Congressional districts. Thus, at the maximum a total of ten North Carolina counties might need to be split to create an equally populous plan, by using whole counties to create Congressional districts and then splitting just one county to balance the population between each of two districts. Fourth, despite the fact that the number of persons needed to populate an equitably populous plan increases each decade (after the 1980 Census the ideal district size was 534,706; after 1990 it was 552,386; and after 2000 it could be as high as 648,104 based on recent state population projections), the percentage of African-American persons in the North Carolina population declined between 1980 and 1990. As Professor Alfred W. Stuart's report for this case reveals, it is likely that the African-American percentage of the total state population will be less in 2000 that it was in 1990. Thus, as the average size of a Congressional district increases, the number of African-American persons of voting age available to constitute a majority of voters in a Congressional district does not increase as rapidly (I will return to this point more specifically later). Finally, as I will consistently point out below, the appropriate social science benchmark for comparison of the challenged plan is the plan of the 1980s (with 11 districts) and not the constitutionally invalidated 12 district plan of the 1990s. Thus, in my assessment of the challenged plan I will be making comparisons to the plan of the 1980s as well as to other Congressional districting plans of the 1990s from states whose

plans have been modified by Federal court order or revised by the state legislatures following invalidation by the Federal courts.

II. ANALYSIS OF DISTRICTING CRITERIA EMPLOYED BY STATE

14. The data needed to address the questions related to the role of race and adherence to race-neutral traditional districting principles was provided by counsel for the Plaintiffs. This material includes documents from the North Carolina General Assembly, special analyses provided by the General Assembly's Information Services Division, and reports and affidavits of both plaintiffs' and defendants' experts. In addition, data compiled by the U.S. Congressional Research Service and the U.S. Census Bureau are analyzed in my answers to these questions.

15. The question of whether race was the predominant factor used by the state of North Carolina to draw the boundaries of the U.S. Congressional districts in 1997 can be addressed by an examination of both tabular data prepared by the North Carolina Information Systems Division from data compiled by the U.S. Bureau of the Census and maps created on the computer facilities of the North Carolina General Assembly Legislative Services Office Redistricting System. Data from both sources are reported in tabular form and on maps to display the use of race as a redistricting criterion.

16. Tabular data showing how race acted as the predominant consideration in the creation of the 1997 plan for the North Carolina Congressional districts are reported in Tables 1 and 2. Table 1 reports for each 1997 North Carolina Congressional district the racial composition of the total population of the counties that were sub-divided in the creation of the plan using data from the County Split Assignments Report of March 26, 1997 of the North Carolina Information Systems Division. For both Districts 1 and 12 that were created to elect an African-American member of Congress, the county splits show a typical pattern of African-American total population majorities in the largest jurisdictions of each district. A total of 22 counties are split across the 12 districts and just one district (District 11) is composed of whole counties. Ten of the split counties are accounted for by the construction of District 1, while another six are accounted for by District 12. Six other counties are split in the plan. Half of the counties in District 1 are split, while 100 percent of the counties (all six) are split in the creation of District 12.

17. Turning first to District 1, six of the ten counties wholly within the district have African-American population majorities and the other four counties have African-American population percentages of at least 42 percent. The racial make-up of the parts of the ten sub-divided counties assigned to District 1 include four with parts over 50 percent African-American, four others with parts of over 40 percent African-American, and two with parts of over 30 percent African-

TABLE 1
Proportion of Total Population in Split Counties
by Congressional District for 1997 Plan (HB 586 -- Plan A)

County/City	CD	Total	White	%	African-Amer.	%
Beaufort	1	23,714	14,659	61.8	8,948	37.7
Craven	1	25,279	14,207	56.2	10,920	43.2
Granville	1	20,717	10,480	50.6	10,106	48.8
Jones	1	8,553	5,045	59.0	3,461	40.5
Lenoir	1	31,016	11,867	38.3	18,959	61.1
Person	1	21,001	13,436	64.0	7,307	34.8
Pitt	1	49,584	23,676	47.7	25,373	51.2
Washington	1	10,750	5,499	51.2	5,207	48.4
Wayne	1	36,323	17,110	47.1	18,781	51.7

TABLE 1 (Ctd.)
Proportion of Total Population in Split Counties
by Congressional District for 1997 Plan (HB 586 -- Plan A)

County/City	CD	Total	White	%	African-Amer.	%
Wilson	1	43,517	21,008	48.2	22,181	51.0
Granville	2	17,628	12,589	71.4	4,803	27.2
Sampson	2	22,745	14,114	62.1	7,985	35.1
Wake	2	185,642	118,648	63.9	62,515	33.7
Wilson	2	22,544	19,615	87.0	2,715	12.0
Beaufort	3	18,569	14,290	76.9	4,246	22.9
Craven	3	56,334	44,453	78.9	10,196	18.1
Jones	3	861	642	74.6	216	25.1
Lenoir	3	26,258	22,435	85.4	3,580	13.6

TABLE 1 (Ctd.)
Proportion of Total Population in Split Counties
by Congressional District for 1997 Plan (HB 586 -- Plan A)

County/City	CD	Total	White	%	African-Amer.	%
Pitt	3	58,340	46,967	80.5	10,548	18.1
Washington	3	3,247	2,057	63.4	1,159	35.7
Wayne	3	68,343	52,062	76.2	15,012	22.0
Chatham	4	29,239	22,800	78.0	6,112	20.9
Person	4	9,179	7,304	79.6	1,799	19.6
Wake	4	237,738	205,363	86.4	25,548	10.7
Alamance	5	79,976	60,647	75.8	18,544	23.2
Forsyth	5	206,766	181,381	87.7	22,997	11.1
Alamance	6	28,237	25,726	91.1	2,278	8.1

TABLE 1 (Ctd.)
Proportion of Total Population in Split Counties
by Congressional District for 1997 Plan (HB 586 -- Plan A)

County/City	CD	Total	White	%	African-Amer.	%
Chatham	6	9,520	6,623	69.6	2,733	28.7
Davidson	6	59,993	57,135	95.2	2,468	4.1
Guilford	6	211,363	186,331	88.2	21,541	10.2
Rowan	6	77,499	70,819	91.4	5,979	7.7
Cumberland	7	127,913	94,213	73.7	27,363	21.4
Robeson	7	81,548	29,364	36.0	17,204	21.1
Sampson	7	24,552	16,159	65.8	7,701	31.4
Cumberland	8	146,653	75,856	51.7	60,133	41.0
Robeson	8	23,631	8,622	36.5	8,981	38.0

TABLE 1 (Ctd.)
Proportion of Total Population in Split Counties
by Congressional District for 1997 Plan (HB 586 -- Plan A)

County/City	CD	Total	White	%	African-Amer.	%
Mecklenburg	9	292,808	264,604	90.4	21,026	7.2
Iredell	10	54,472	48,438	88.9	5,526	10.1
Davidson	12	66,684	56,161	84.2	9,846	14.8
Forsyth	12	59,112	15,537	26.3	43,105	72.9
Guilford	12	136,057	63,253	46.5	70,114	51.5
Iredell	12	38,459	28,769	74.8	9,343	24.3
Mecklenburg	12	218,625	100,047	45.9	113,442	51.9
Rowan	12	33,106	21,032	63.5	11,794	35.6

DECLARATION FOR RONALD WEBER, CONTINUED . . .

American. The African-American percentage of the total population in the counties split across District 1 and another district is above the district-wide African-American percentage in four counties. The African-American percentage of the total population is above 60 percent in Lenoir County and above 50 percent in Pitt, Wayne, and Wilson Counties. Conversely, Table 1 reports that the African-American percentage of the total population in the parts of most of those split counties assigned to another district than District 1 is consistently lower. For example, the part of Lenoir County assigned to District 3 is 13.6 percent African-American in total population, while the part of Pitt County allocated to District 3 is 18.1 percent African-American in total population. The county splits as they impact the white majority districts in eastern North Carolina can be divided into two categories: 1) those county splits for the districts where the intent usually was to provide African-American voters to shore up the electoral bases of candidates who might be characterized as candidates of choice of African-American voters (e.g. Districts 2 and 4), and 2) those county splits for the district where the intent usually was to carve out African-American voters so as not to endanger the electoral bases of the candidates who might not be characterized as candidates of choice of minority voters (e.g. District 3). Almost every time there was an opportunity to use race as the basis for dividing political subdivisions up politically, the North Carolina Congressional districting plan does it in the eastern part of the state.

18. Turning next to District 12, the racial make-up of the parts of the six sub-divided counties assigned to District 12 include three with parts over 50 percent African-American and three in which the African-American percentage is under 50 percent. Almost 75 percent of the total population in District 12 comes from the three county parts which are majority African-American in population. Mecklenburg, Forsyth, and Guilford counties which contribute almost 75 percent of the district's total population are located at the extremes of the district. The other three county parts (Davidson, Iredell, and Rowan) have narrow corridors which were designed to pick up as many African-American persons from each of those counties to fill out the district to an ideal sized district. A precinct level map of District 12 shows that all African-American majority precincts but one in those three counties have been assigned to the district. Conversely, Table 1 reports that the African-American percentage of the total population in the parts of those split counties assigned to another district than District 12 is consistently lower. For example, the part of Mecklenburg County assigned to District 9 is 7.2 percent African-American in total population, while the part of Forsyth County allocated to District 5 is 11.1 percent African-American in total population and the part of Guilford County assigned to District 6 is 10.2 percent African-American. The county splits as they impact the white majority districts adjacent to District 12 in the Piedmont are those county splits for the districts where the intent usually was to carve out African-American voters so as not to endanger the

electoral bases of the candidates who might not be characterized as candidates of choice of minority voters (e.g. Districts 5, 6, and 9). Almost every time there was an opportunity to use race as the basis for dividing political subdivisions up politically, the North Carolina Congressional districting plan does it in the Piedmont part of the state as well.

19. Table 2 provides further confirmation that race was the predominant factor in the drawing of the lines for the North Carolina Congressional districts in 1997. This table reports the exact same data as in Table 1 except that in Table 2 the data are organized by county rather than Congressional district. For example, the pattern shown in each of the ten counties that are split between District 1 and an adjacent district is one in which most of the time the sub-division was along racial lines. All ten counties were split along racial lines. The most dramatic examples from Table 2 include Lenoir County where 61.1 percent of the total population allocated to District 1 is African-American while only 13.6 percent of the total population assigned to District 3 is African-American, and Wilson County where 51.0 percent of the total population allocated to District 1 is African-American while only 12.0 percent of the total population assigned to District 2 is African-American. A similar pattern holds in the other eight counties of District 1. In each of those counties, the population on the District 1 side of the Congressional district line is more strongly African-American while being more strongly white on the other side of the line in an adjacent district.

TABLE 2
Proportion of Total Population in Split Counties
by County for 1997 Congressional Districting Plan (HB 586 -- Plan A)

County/City	CD	Total	White	%	African-Amer.	%
Alamance	5	79,976	60,647	75.8	18,544	23.2
Alamance	6	28,237	25,726	91.1	2,278	8.1
Beaufort	1	23,714	14,659	61.8	8,948	37.7
Beaufort	3	18,569	14,290	76.9	4,246	22.9
Chatham	4	29,239	22,800	78.0	6,112	20.9
Chatham	6	9,520	6,623	69.6	2,733	28.7
Craven	1	25,279	14,207	56.2	10,920	43.2
Craven	3	56,334	44,453	78.9	10,196	18.1
Cumberland	7	127,913	94,213	73.7	27,363	21.4

TABLE 2 (Ctd.)
Proportion of Total Population in Split Counties
by County for 1997 Congressional Districting Plan (HB 586 -- Plan A)

County/City	CD	Total	White	%	African-Amer.	%
Cumberland	8	146,653	75,856	51.7	60,133	41.0
Davidson	6	59,993	57,135	95.2	2,468	4.1
Davidson	12	66,684	56,161	84.2	9,846	14.8
Forsyth	5	206,766	181,381	87.7	22,997	11.1
Forsyth	12	59,112	15,537	26.3	43,105	72.9
Granville	1	20,717	10,480	50.6	10,106	48.8
Granville	2	17,628	12,589	71.4	4,803	27.2
Guilford	6	211,363	186,331	88.2	21,541	10.2
Guilford	12	136,057	63,253	46.5	70,114	51.5

TABLE 2 (Ctd.)
Proportion of Total Population in Split Counties
by County for 1997 Congressional Districting Plan (HB 586 -- Plan A)

County/City	CD	Total	White	%	African-Amer.	%
Iredell	10	54,472	48,438	88.9	5,526	10.1
Iredell	12	38,459	28,769	74.8	9,343	24.3
Jones	1	8,553	5,045	59.0	3,461	40.5
Jones	3	861	642	74.6	216	25.1
Lenoir	1	31,016	11,887	38.3	18,959	61.1
Lenoir	3	26,258	22,435	85.4	3,580	13.6
Mecklenburg	9	292,808	264,604	90.4	21,026	7.2
Mecklenburg	12	218,625	100,047	45.9	113,442	51.9
Person	1	21,001	13,436	64.0	7,307	34.8

TABLE 2 (Ctd.)
Proportion of Total Population in Split Counties
by County for 1997 Congressional Districting Plan (HB 586 -- Plan A)

County/City	CD	Total	White	%	African-Amer.	%
Person	4	9,179	7,304	79.6	1,799	19.6
Pitt	1	49,584	23,676	47.7	25,373	51.2
Pitt	3	58,340	46,967	80.5	10,548	18.1
Robeson	7	81,548	29,364	36.0	17,204	21.1
Robeson	8	23,631	8,622	36.5	8,981	38.0
Rowan	6	77,499	70,819	91.4	5,979	7.7
Rowan	12	33,106	21,032	63.5	11,794	35.6
Sampson	2	22,745	14,114	62.1	7,985	35.1
Sampson	7	24,552	16,159	65.8	7,701	31.4

TABLE 2 (Ctd.)
Proportion of Total Population in Split Counties
by County for 1997 Congressional Districting Plan (HB 586 -- Plan A)

County/City	CD	Total	White	%	African-Amer.	%
Wake	2	185,642	118,648	63.9	62,515	33.7
Wake	4	237,738	205,363	86.4	25,548	10.7
Washington	1	10,750	5,499	51.2	5,207	48.4
Washington	3	3,247	2,057	63.4	1,159	35.7
Wayne	1	36,323	17,110	47.1	18,781	51.7
Wayne	3	68,343	52,062	76.2	15,012	22.0
Wilson	1	43,517	21,008	48.2	22,181	51.0
Wilson	2	22,544	19,615	87.0	2,715	12.0

20. The pattern shown in each of the six counties that are split between District 12 and an adjacent district is one in which most of the time the sub-division was along racial lines. All six counties were split along racial lines. The most dramatic examples from Table 2 include Forsyth County where 72.9 percent of the total population allocated to District 12 is African-American while only 11.1 percent of the total population assigned to District 5 is African-American, and Mecklenburg County where 51.9 percent of the total population allocated to District 12 is African-American while only 7.2 percent of the total population assigned to District 9 is African-American. Similarly, I find Guilford County where 51.5 percent of the total population allocated to District 12 is African-American while only 10.2 percent of the total population assigned to District 9 is African-American. A similar pattern holds in the other three counties of District 12. In each of those counties, the population on the District 12 side of the Congressional district line is more strongly African-American while being more strongly white on the other side of the line in an adjacent district. I can infer from these data that race was a predominant factor in the line drawing for Districts 1 and 12 and the adjacent districts in the 1997 North Carolina Congressional district plan.

21. I have also examined data related to city and town splits in 1997 North Carolina Congressional district plan. These data will be used to determine whether I should alter my opinion that race was a predominant factor in the construction

of the districts. Using a report titled Places Split by 97 North Carolina Congressional Districts prepared by Dan Frey, GIS Analyst, with the North Carolina General Assembly Information Systems Division, I created Tables 3 and 4. These tables are directly comparable to Tables 1 and 2. Note that these tables include every city or town in North Carolina that is split across two or more districts by geography in the 1997 plan. Thus, there are four places where the geographical split does not involve people on both sides of the line. Furthermore, there are several others where a small number of people are split away from a larger number of people by the use of the precincts in the 1997 Congressional districting plan.

22. According to Table 3, 11 of 13 cities or towns were split along racial lines to create Congressional district 1. Nine of the cities or towns split between district 1 and another district involve placing a majority of the African-American population into District 1 as displayed in Table 3. When cities or towns were split to achieve population equality, the racial composition of the components differ little. When the splits are for racial purposes, the differences are large.

23. A similar pattern of splitting cities or towns is shown for District 12. Nine of 13 cities or towns were split along racial lines to create Congressional district 12. Five of the cities or towns split between district 12 and another district involve placing a majority of the African-American population

TABLE 3
Proportion of Total Population in Split Municipalities and Census Designated Places by Congressional District for 1997 Plan (HB 586 -- Plan A)

City/Town	CD	Total	Non-Af. Amer.	%	African-Amer.	%
Ayden	1	4,590	2,186	47.6	2,404	52.4
Battleboro*	1	280	99	35.4	181	64.6
Fremont	1	1,638	784	47.9	854	52.1
Goldsboro	1	25,734	9,833	38.2	15,901	61.8
Greenville	1	19,249	6,052	31.4	13,197	68.6
Kinston	1	16,328	2,968	18.2	13,360	81.8
New Bern	1	13,921	7,201	51.7	6,720	48.3
Rocky Mount	1	17,057	2,584	15.1	14,473	84.9
Sharpsburg*	1	482	91	18.9	391	81.1

TABLE 3 (Ctd.)
Proportion of Total Population in Split Municipalities and Census
Designated Places by Congressional District for 1997 Plan (HB 586 -- Plan A)

City/Town	CD	Total	Non-Af. Amer.	%	African-Amer.	%
Trent Woods	1	299	299	100.0	0	0.0
Washington	1	9,073	4,915	54.2	4,158	45.8
Whitakers*	1	464	183	39.4	281	60.6
Wilson	1	26,127	9,355	35.8	16,772	64.2
Battleboro*	2	167	156	93.4	11	6.6
Clinton	2	7,313	4,024	55.0	3,289	45.0
Garner	2	3,008	2,232	74.2	776	25.8
Raleigh	2	107,979	60,848	56.4	47,131	43.6
Rocky Mount	2	31,940	22,116	69.2	9,824	30.8

TABLE 3 (Ctd.)
Proportion of Total Population in Split Municipalities and Census
Designated Places by Congressional District for 1997 Plan (HB 586 -- Plan A)

City/Town	CD	Total	Non-Af. Amer.	%	African-Amer.	%
Sharpsburg*	2	1,054	861	81.7	193	18.3
Whitakers*	2	396	233	58.8	163	41.2
Wilson	2	10,803	10,249	94.9	554	5.1
Ayden	3	150	150	100.0	0	0.0
Fremont	3	72	10	13.9	62	86.1
Goldsboro	3	14,975	11,562	77.2	3,413	22.8
Greenville	3	25,723	23,583	91.7	2,140	8.3
Kinston	3	8,967	7,712	86.0	1,255	14.0
Mount Olive*	3	4,581	2,117	47.5	2,404	52.5

TABLE 3 (Ctd.)
Proportion of Total Population in Split Municipalities and Census
Designated Places by Congressional District for 1997 Plan (HB 586 -- Plan A)

City/Town	CD	Total	Non-Af. Amer.	%	African-Amer.	%
New Bern	3	3,442	2,500	75.5	843	24.5
Surf City*	3	317	314	99.1	3	0.9
Trent Woods	3	2,067	2,067	100.0	0	0.0
Washington	3	2	2	100.0	0	0.0
Garner	4	11,959	10,102	84.5	1,857	15.5
Mebane*	4	485	420	86.6	65	13.4
Raleigh	4	99,973	89,744	89.8	10,229	10.2
Burlington	5	36,339	27,580	75.9	8,759	24.1
Elkin*	5	3,720	3,373	90.7	347	9.3

TABLE 3 (Ctd.)
Proportion of Total Population in Split Municipalities and Census
Designated Places by Congressional District for 1997 Plan (HB 586 -- Plan A)

City/Town	CD	Total	Non-Af. Amer.	%	African-Amer.	%
Gibsonville*	5	1,480	1,332	90.0	148	10.0
Graham	5	7,234	5,857	81.0	1,377	19.0
High Point	5	6	6	100.0	0	0.0
Kernersville	5	10,836	10,230	94.4	606	5.6
Mebane*	5	4,269	3,382	79.2	887	20.8
Winston-Salem	5	89,215	74,885	83.9	14,330	16.1
Burlington	6	3,159	3,009	95.3	150	4.7
Gibsonville*	6	1,961	1,483	75.6	478	24.4
Graham	6	3,192	2,896	90.7	296	9.3

TABLE 3 (Ctd.)
Proportion of Total Population in Split Municipalities and Census
Designated Places by Congressional District for 1997 Plan (HB 586 -- Plan A)

City/Town	CD	Total	Non-Af. Amer.	%	African-Amer.	%
Greensboro	6	88,441	78,981	89.3	9,460	10.7
High Point	6	37,200	32,833	88.3	4,367	11.7
Kannapolis	6	8,476	7,149	84.3	1,327	15.7
Kernersville	6	0	0	0.0	0	0.0
Lexington	6	2,885	2,522	87.4	363	12.6
Salisbury	6	5,250	4,442	84.6	808	15.4
Spencer	6	8	6	75.0	2	25.0
Thomasville	6	6,909	6,249	90.4	660	9.6
Clinton	7	891	720	80.8	171	19.2

TABLE 3 (Ctd.)
Proportion of Total Population in Split Municipalities and Census
Designated Places by Congressional District for 1997 Plan (HB 586 -- Plan A)

City/Town	CD	Total	Non-Af. Amer.	%	African-Amer.	%
Fayetteville	7	44,988	34,279	76.2	10,709	23.8
Mount Olive*	7	1	0	0.0	1	100.0
Red Springs	7	58	58	100.0	0	0.0
Surf City*	7	653	662	99.8	1	0.2
Fayetteville	8	30,707	12,437	40.5	18,270	59.5
Kannapolis	8	21,220	17,205	81.1	4,015	18.9
Red Springs	8	3,736	1,771	47.4	1,965	52.6
Weddington*	8	3,803	3,695	97.2	108	2.8
Charlotte	9	213,515	196,172	91.9	17,343	8.1

TABLE 3 (Ctd.)
Proportion of Total Population in Split Municipalities and Census
Designated Places by Congressional District for 1997 Plan (HB 586 -- Plan A)

City/Town	CD	Total	Non-Af. Amer.	%	African-Amer.	%
Cornelius	9	308	304	98.7	4	1.3
Weddington*	9	0	0	0.0	0	0.0
Davidson*	10	0	0	0.0	0	0.0
Elkin	10	70	62	88.6	8	11.4
Mooresville	10	0	0	0.0	0	0.0
Statesville	10	12,324	9,997	81.1	2,327	18.9
Troutman	10	1,419	1,024	72.2	395	27.8
Charlotte	12	182,419	73,935	40.5	108,484	59.5
Cornelius	12	2,273	1,752	77.1	521	22.9

TABLE 3 (Ctd.)
Proportion of Total Population in Split Municipalities and Census
Designated Places by Congressional District for 1997 Plan (HB 586 -- Plan A)

City/Town	CD	Total	Non-Af. Amer.	%	African-Amer.	%
Davidson*	12	4,046	3,407	84.2	639	15.8
Greensboro	12	95,080	42,236	44.4	52,844	55.6
High Point	12	32,290	15,677	48.6	16,613	51.4
Lexington	12	13,696	9,143	66.8	4,553	33.2
Mooresville	12	8,818	6,687	75.8	2,131	24.2
Salisbury	12	17,837	10,521	59.0	7,316	41.0
Spencer	12	3,211	2,488	77.5	723	22.5
Statesville	12	5,243	1,290	24.6	3,953	75.4
Thomasville	12	9,006	5,246	58.3	3,760	41.7

TABLE 3 (Ctd.)
Proportion of Total Population in Split Municipalities and Census Designated Places by Congressional District for 1997 Plan (HB 586 -- Plan A)

City/Town	CD	Total	Non-Af. Amer.	%	African-Amer.	%
Troutman	12	74	74	100.0	0	0.0
Winston-Salem	12	54,270	12,272	22.6	41,998	77.4

* City or town is split across a county boundary.

Source: North Carolina General Assembly, Information Systems Division. All information is based on that in the General Assembly's apportionment system. Provided by Dan Frey, GIS Analyst.

TABLE 4
Proportion of Total Population in Split Municipalities and Census Designated places by City or Town for 1997 Plan (HB 586 -- Plan A)

City/Town	CD	Total	White	%	African-Amer.	%
Ayden	1	4,590	2,186	47.6	2,404	52.4
Ayden	3	150	150	100.0	0	0.0
Battleboro*	1	280	99	35.4	181	64.6
Battleboro*	2	167	156	93.4	11	6.6
Burlington	5	36,339	27,580	75.9	8,759	24.1
Burlington	6	3,159	3,009	95.3	150	4.7
Charlotte	9	213,515	196,172	91.9	17,343	8.1
Charlotte	12	182,419	73,935	40.5	108,484	59.5
Clinton	2	7,313	4,024	55.0	3,289	45.0

TABLE 4 (Ctd.)
Proportion of Total Population in Split Municipalities and Census
Designated places by City or Town for 1997 Plan (HB 586 -- Plan A)

City/Town	CD	Total	White	%	African-Amer.	%
Clinton	7	891	720	80.8	171	19.2
Cornelius	9	308	304	98.7	4	1.3
Cornelius	12	2,273	1,752	77.1	521	22.9
Davidson*	10	0	0	0.0	0	0.0
Davidson*	12	4,046	3,407	84.2	639	15.8
Elkin*	5	3,720	3,373	90.7	347	9.3
Elkin*	10	70	62	88.6	8	11.4
Fayetteville	7	44,988	34,279	76.2	10,709	23.8
Fayetteville	8	30,707	12,437	40.5	18,270	59.5

TABLE 4 (Ctd.)
Proportion of Total Population in Split Municipalities and Census
Designated places by City or Town for 1997 Plan (HB 586 -- Plan A)

City/Town	CD	Total	White	%	African-Amer.	%
Fremont	1	1,638	784	47.9	854	52.1
Fremont	3	72	10	13.9	62	86.1
Garner	2	3,008	2,232	74.2	776	25.8
Garner	4	11,959	10,102	84.5	1,857	15.5
Gibsonville*	5	1,480	1,332	90.0	148	10.0
Gibsonville*	6	1,961	1,483	75.6	478	24.4
Goldsboro	1	25,734	9,833	38.2	15,901	61.8
Goldsboro	3	14,975	11,562	77.2	3,413	22.8
Graham	5	7,234	5,857	81.0	1,377	19.0

TABLE 4 (Ctd.)
Proportion of Total Population in Split Municipalities and Census Designated places by City or Town for 1997 Plan (HB 586 -- Plan A)

City/Town	CD	Total	White	%	African-Amer.	%
Graham	6	3,192	2,896	90.7	296	9.3
Greensboro	6	88,441	78,981	89.3	9,460	10.7
Greensboro	12	95,080	42,236	44.4	52,844	55.6
Greenville	1	19,249	6,052	31.4	13,197	68.6
Greenville	3	25,723	23,583	91.7	2,140	8.3
High Point	5	6	6	100.0	0	0.0
High Point	6	37,200	32,833	88.3	4,367	11.7
High Point	12	32,290	15,677	48.6	16,613	51.4
Kannapolis	6	8,476	7,149	84.3	1,327	15.7

TABLE 4 (Ctd.)
Proportion of Total Population in Split Municipalities and Census Designated places by City or Town for 1997 Plan (HB 586 -- Plan A)

City/Town	CD	Total	White	%	African-Amer.	%
Kannapolis	8	21,220	17,205	81.1	4,015	18.9
Kernersville	5	10,836	10,230	94.4	606	5.6
Kernersville	6	0	0	0.0	0	0.0
Kinston	1	16,328	2,968	18.2	13,360	81.8
Kinston	3	8,967	7,712	86.0	1,255	14.0
Lexington	6	2,885	2,522	87.4	363	12.6
Lexington	12	13,696	9,143	66.8	4,553	33.2
Mebane*	4	485	420	86.6	65	13.4
Mebane*	5	4,269	3,382	79.2	887	20.8

TABLE 4 (Ctd.)
Proportion of Total Population in Split Municipalities and Census Designated places by City or Town for 1997 Plan (HB 586 -- Plan A)

City/Town	CD	Total	White	%	African-Amer.	%
Mooresville	10	0	0	0.0	0	0.0
Mooresville	12	8,818	6,687	75.8	2,131	24.2
Mount Olive*	3	4,581	2,177	47.5	2,404	52.5
Mount Olive*	7	1	0	0.0	1	100.0
New Bern	1	13,921	7,201	51.7	6,720	48.3
New Bern	3	3,442	2,599	75.5	843	24.5
Raleigh	2	107,979	60,848	56.4	47,131	43.6
Raleigh	4	99,973	89,744	89.8	10,229	10.2

TABLE 4 (Ctd.)
Proportion of Total Population in Split Municipalities and Census Designated places by City or Town for 1997 Plan (HB 586 -- Plan A)

City/Town	CD	Total	White	%	African-Amer.	%
Red Springs	7	58	58	100.0	0	0.0
Red Springs	8	3,736	1,771	47.4	1,965	52.6
Rocky Mount	1	17,057	2,584	15.1	14,473	84.9
Rocky Mount	2	31,940	22,116	69.2	9,824	30.8
Salisbury	6	5,250	4,442	84.6	808	15.4
Salisbury	12	17,837	10,521	59.0	7,316	41.0
Sharpsburg*	1	482	91	18.9	391	81.1
Sharpsburg*	2	1,054	861	81.7	193	18.3

TABLE 4 (Ctd.)
Proportion of Total Population in Split Municipalities and Census
Designated places by City or Town for 1997 Plan (HB 586 -- Plan A)

City/Town	CD	Total	White	%	African-Amer.	%
Spencer	6	8	6	75.0	2	25.0
Spencer	12	3,211	2,488	77.5	723	22.5
Statesville	10	12,324	9,997	81.1	2,327	18.9
Statesville	12	5,243	1,290	24.6	3,953	75.4
Surf City*	3	317	314	99.1	3	0.9
Surf City*	7	653	652	99.8	1	0.2
Thomasville	6	6,909	6,249	90.4	660	9.6
Thomasville	12	9,006	5,246	58.3	3,760	41.7

TABLE 4 (Ctd.)
Proportion of Total Population in Split Municipalities and Census
Designated places by City or Town for 1997 Plan (HB 586 -- Plan A)

City/Town	CD	Total	White	%	African-Amer.	%
Trent Woods	1	299	299	100.0	0	0.0
Trent Woods	3	2,067	2,067	100.0	0	0.0
Troutman	12	74	74	100.0	0	0.0
Troutman	10	1,419	1,024	72.2	395	27.8
Washington	1	9,073	4,915	54.2	4,158	45.8
Washington	3	2	2	100.0	0	0.0
Weddington *	8	3,803	3,695	97.2	108	2.8

TABLE 4 (Ctd.)
Proportion of Total Population in Split Municipalities and Census Designated places by City or Town for 1997 Plan (HB 586 -- Plan A)

City/Town	CD	Total	White	%	African-Amer.	%
Weddington *	9	0	0	0.0	0	0.0
Whitakers*	1	464	183	39.4	281	60.6
Whitakers*	2	396	233	58.8	163	41.2
Wilson	1	26,127	9,355	35.8	16,772	64.2
Wilson	2	10,803	10,249	94.9	554	5.1
Winston-Salem	5	89,215	74,885	83.9	14,330	16.1
Winston-Salem	12	54,270	12,272	22.6	41,998	77.4

* City or town is split across a county boundary.

Source: North Carolina General Assembly, Information Systems Division. All information is based on that in the General Assembly's apportionment system. Provided by Dan Frey, GIS Analyst.

into District 12 as displayed in Table 3. Also the four largest cities assigned to District 12 are split along racial lines.

24. The above analysis is further confirmed by the listing of split cities and towns in Table 4. Here one can see how most of the cities and towns assigned to District 1 are split along racial lines. Particularly striking are the figures for Goldsboro, Greenville, Kinston, Rocky Mount, and Wilson. Table 4 also highlights the racial splits of the cities or towns assigned to District 12. Again the difference in the figures for Charlotte, Greensboro, High Point, Statesville, and Winston-Salem are large. On the other hand, many of the cities and towns split between other districts do not display large racial differences (exceptions are Fayetteville and Raleigh).

25. Defendants' experts point out that the 1997 North Carolina Congressional districting plan relies almost without exception to the 1990 Voting Tabulation Districts (VTDs) or precincts as the building blocks for constructing districts. They note that only two precincts were split in constructing the 12 districts. One of these two precincts is in Mecklenburg County and was split to provide a geographical land bridge to connect two parts of District 9 to each other. The precinct in discussion is Charlotte Precinct 77 and extends to the southern county boundary and the state line with South Carolina. The precinct is a predominantly African-American majority precinct and the bulk of the people was needed to create a race-based District 12. Thus, the state split the precinct

placing one non-African-American person in the part of the precinct in District 9. If that one person is a registered voter and does vote in a Congressional election, there will be a ballot secrecy issue for that one voter. The other split precinct is in Craven County where 23 persons are put in District 3 rather than District 1 with remainder of the precinct's residents.

26. The discussion of not splitting precincts by defendants' experts misunderstands how racially homogeneous precincts are today in North Carolina and other parts of the nation. For example, both Georgia and South Carolina, split only a small number of precincts in creating their Congressional Districting plans of the 1990s but this fact did not prevent plaintiffs from invalidating Districts 2 and 11 in Georgia and from attacking District 6 in North Carolina. Louisiana did not split a single precinct in the creation of the two plans invalidated by the *Hays* court in the Western District of Louisiana. Thus, given the homogeneous racial character of precincts in North Carolina, it is quite possible to draw districts in which race predominates using whole precincts.

27. I began to answer the question of whether the districts in the 1997 North Carolina Congressional districting plan subordinate race-neutral traditional redistricting principles when I discussed above the tabular data on the splitting of counties, cities, and towns. The state of North Carolina subordinated the splitting of county, city, and town boundaries to a desire to allocate persons by race to a greater extent than

necessary to comply with the one-person, one-vote standard of population equality. This was particularly true in the drawing of Districts 1 and 12 as well as adjacent districts. A total of 22 counties and 41 cities and towns were split in the drawing of the 1997 North Carolina Congressional districting plan, for a total of 63 split political subdivisions. Only six counties and 15 cities and towns were split to create the other districts (several of the cities and towns were split because they are on a county boundary and different counties were assigned to different districts). In the recent past no counties had been split to create the 11 districts of the 1960s and 1970s, while just four had been split to construct the 11 districts of the 1980s. The maximum number of counties needed to be split to fashion an 12 district plan is 11, allowing for one county to be split between each two districts.

28. A report by David C. Huckabee, "Congressional Districts: Objectively Evaluating Shapes," *CRS Report for Congress* (Washington: Congressional Research Service, The Library of Congress), May 24, 1994, also contains information from other states to compare with the experience of North Carolina in Congressional districting. Recall that North Carolina's Congressional District 1 in the 1997 plan has 20 counties, ten of which were split with another district (50 percent) and that District 12 has six counties, all six of which are split (100.0 percent). This Huckabee report as well as subsequent data reveals that nationwide, only the original Florida 3, the original Georgia 2, the original and revised

Louisiana districts 4, the original Louisiana 5 and 6, the current South Carolina 6, and the original Virginia 3 have a greater number of split parishes or counties than North Carolina District 1. Original Louisiana district 4 had 24 split parishes, original Florida district 3 had 14 split counties, revised Louisiana district 4 had 13 split parishes, original Georgia district 2 had 12 split counties, and original Louisiana 5 and 6 as well as current South Carolina 6 and original Virginia 3 had/have 11 split counties. All of these listed districts but South Carolina 3 have been invalidated by the Federal courts.

29. Huckabee also provides information on the percentage of split counties allocated to the Congressional districts of the 1990s. There are a large number of Congressional districts from around the nation which have 100 percent of the counties split which are allocated to a district. Most of these are plans involving splits of large counties in the metropolitan areas of the country and these plans are not comparable to the North Carolina setting. No single district in the country is like North Carolina 12 in splitting as many as six counties and sub-dividing 100 percent of them.

30. Huckabee also provides information on the number of places having populations of 10,000 or more and indicates how many of these are split by district lines. In the 1997 plan, North Carolina district 1 has nine such places (either cities or towns, and six of them are divided between district 1 and another district. District 12 has eight cities or towns

10,000 or more in population, and all eight of them are split between districts.

31. Another race-neutral traditional redistricting criterion involves the issue of geographical contiguity. I have examined the maps of the 1997 Congressional districting plan to determine whether the state adhered to geographical contiguity in the construction of the plans. I find that the plans are technically contiguous in that parts of geographical territories are joined together through water areas or narrow land bridges. A person wishing to traverse Congressional district 3 by automobile, for example, would have to leave the district, then go through another district, before returning to district 3. The best examples of technical contiguity occur in Beaufort and Pamlico counties where two parts of district 3 are joined across the Pamlico Sound, in the city of Charlotte where two parts of district 9 are connected through a split precinct at the southern edge of Mecklenburg County, and in Guilford County and the city of High Point where a narrow land bridge is used to connect Davidson County with the city of Greensboro in Guilford County. Although the Congressional districts are technically contiguous, the district lines do not promote functional contiguity. Anyone serving districts 3, 9, and 12 in the U.S. Congress will need to travel usually outside each district in order to traverse the district each is serving in the most efficient manner.

32. Another race-neutral traditional redistricting principle involves the issue of geographical compactness. The issue of geographical compactness can be addressed first by examining maps of the 1997 Congressional districts. A statewide map of the 1997 districts and detailed maps of Districts 1 and 12 demonstrate clearly that Districts 1 and 12 as well as adjacent districts are oddly shaped and not compact.

33. A second way to assess the compactness of a Congressional district is to use a variety of compactness measures now standard in political science. These measures are reported upon in two works--1) Richard H. Pildes and Richard G. Niemi, "Expressive Harms, 'Bizarre Districts,' and Voting Rights: Evaluating Election-District Appearances after *Shaw*," *Michigan Law Review*, Vol. 92 (December 1993), pp. 101-205, and 2) David C. Huckabee, "Congressional Districts: Objectively Evaluating Shapes," *CRS Report for Congress* (Washington: Congressional Research Service, The Library of Congress), May 24, 1994. The actual computations of the compactness scores reported in these two works were conducted by Kimball Brace and Douglas Chapin of Election Data Services, Inc., Washington, D.C.

34. Three measures of compactness are reported in the Huckabee report for all 435 Congressional districts in the U.S. adopted following the release of the 1990 Census of Population. Huckabee adopts two geographic measures--a dispersion measure and a perimeter measure -- and one

population measure. Pildes and Niemi rely on the same two geographic compactness measures reported by Huckabee. Gerald Webster in his report for the defendants in this case use the same two geographic compactness measures as Pildes and Niemi as well as Huckabee.

35. Combining information about the two measures of geographical compactness in the Huckabee report with those in the Webster report I can see that North Carolina's Congressional District 12 is still the least compact district in North Carolina on both indicators of geographic compactness and that District 1 is the second least compact district on the perimeter measure and the fourth least compact district on the dispersion measure. In Appendix E of the Huckabee report, he reports a table containing the two geographic compactness scores for the bottom ten percent of Congressional districts in the nation. Using the criterion of having at least one compactness score in the bottom ten percent, North Carolina 12 would clearly continue in that compilation while North Carolina 1 would probably not make the list of the worst ten percent of the districts even though many of the lowest districts in Huckabee's table have moved up to higher scores will revised districts. A number of Congressional districts in other states with lower perimeter or dispersion scores have been found to be unconstitutional by Federal district courts. North Carolina 12 is less compact than struck-down Florida 3 on one indicator, than invalidated Georgia districts 2 and 11 on both indicators, than unconstitutional Louisiana 4 on one indicator,

than invalidated New York 12 on one indicator, than struck-down Texas districts 18, 29, and 30 on one indicator, and unconstitutional Virginia 3 on both indicators. I have also taken the perimeter and dispersion compactness scores from the Huckabee report and revised the ranking order for the worst districts on each measure (this process has used the best information on the two compactness scores for the current Congressional districts, some of which is contained in the Webster report). North Carolina 12 ranks either 430 or 431 out of 435 in compactness using the dispersion measure (I am unable to determine whether the state of New York increased the compactness of District 8 when it recently reworked is plan to remedy the unconstitutionality of District 12). North Carolina 12 ranks either 432 or 433 of 435 in compactness using the perimeter measure. Thus, North Carolina 12 continues to be the least compact district in North Carolina and among the worst in the nation in terms of geographical compactness.

36. Pildes and Niemi report geographic compactness scores for the Congressional districts of the 1980s using the dispersion and perimeter measures. These scores for the old 11 districts in North Carolina are used to compare to the scores for the current 12 districts in the 1997 plan.[1] The range on the

---

[1]Richard H. Pildes and Richard G. Niemi, "Expressive Harms, 'Bizarre Districts,' and Voting Rights: Evaluating Election-District Appearances after *Shaw*," *Michigan Law Review*, Vol. 92 (December 1993), Table 6, pp. 189-91.

dispersion measure in North Carolina runs from a low of .26 to a high of .57 and averages .36 across the 11 districts in the 1980s. In the 1997 plan, the range on the dispersion measure runs from a low of .11 to a high of .62 and averages .35 across the current 12 districts. The range on the perimeter measure in North Carolina runs from a low of .22 to a high of .46 and averages .30 across the 11 districts in the 1980s. In the 1997 plan, the range on the perimeter measure runs from a low of .04 to a high of .33 and averages .19 across the current 12 districts. This comparison reveals that the 1997 12 district plan is less compact overall than the 11 district plan of the 1980s, using the two standard measures of geographic compactness.

37. A final race-neutral traditional redistricting criterion involves the issue of regional communities of interest. I have examined a map of the regions of North Carolina included in the Stuart report for this case (Figure 5). One of the clearest distinctions is between the Tidewater, Inner Coastal Plains, and Piedmont areas of North Carolina. Thus, current Congressional district 1 is in two principal community of interest regions of North Carolina. On the other hand, current District 12 includes parts of six counties all in the Piedmont Region. Thus, traditional regional communities of interest were merged in the construction of district 1 in the current North Carolina Congressional districting plan.

38. To sum up my conclusions about the predominant use of race and the subordination of race-neutral

traditional districting principles to race by the state of North Carolina in the creation of the Congressional districts in 1997, I find that a significant number of persons are assigned to districts in eastern North Carolina and the Piedmont Region based on race. I conclude that race was a predominant factor in the construction of Districts 1, 3, 9, and 12. To a lesser extent race also affected the drawing of Districts 5, 6, and 10 in that certain counties in those districts were split on a racial basis. I also conclude that race-neutral traditional districting principles were subordinated in the creation of these districts. The state of North Carolina did not adhere to compactness in creating the districts, more counties, cities, and towns were split than needed in constructing the districts, and community of interest regions were not followed in the design of the districts. I found districts 3, 9, and 12 to be only technically contiguous, and that those three districts were not functionally contiguous.

III. NUMEROSITY AND CONCENTRATION OF AFRICAN-AMERICAN VOTERS

39. I conclude that the African-American voting age population in no part of North Carolina is sufficiently numerous or geographically compact enough to be a majority of voters using traditional districting principles to draw a single-member Congressional district. An equitably populated Congressional district in North Carolina needs a total population of about 552,386 persons using 1990 Census of Population data. First, an examination of maps and statistical

data at the county, city, and precinct levels by race indicates that there are is only one potential area where one might locate enough African-American persons of voting age to create a geographically compact district. The area is in the northeastern part of the state located primarily among the counties of the Inner Coastal Plain region.

40. The best evidence of the difficulty of constructing such an African-American majority district is contained in material from the 1997 Section 5 submission of North Carolina. This material indicates that current Congressional district 1 does not contain either a majority of the voting age population or of registered voters who are African-American. The African-American VAP for District 1 is 46.54 percent and the African-American percentage of the registered voters in the district is 44.89 percent. I presume that if the General Assembly could have created a voting age population majority-minority district in northeastern North Carolina it would have done so. There are no large cities in the Inner Coastal Plain region from which to draw a sufficient number of African-American persons to readily construct a majority-minority Congressional district (contrast North Carolina cities with Atlanta, Birmingham, New Orleans, and Memphis where large African-American population concentrations exist). Thus, not enough African-American persons reside in the either the Inner Coastal Plain region to make up a majority of the eligible voters in a single-member district for Congress.

IV. ELECTORAL SAFENESS OF THE CONGRESSIONAL DISTRICTS 1 AND 12

41. To assess the electoral safety of Congressional Districts 1 and 12 in the North Carolina Congressional districting plan of 1997, I use electoral history included in the reports of plaintiffs' expert Lee Mortimer and defendants' expert David W. Peterson. In my scholarly work on state legislative elections, I consider any election in which one candidate gets 60 percent or more of the total vote among two candidates as being a non-competitive election. Elections won by less than 60 percent are considered competitive. Students of congressional elections generally adopt the same threshold for distinguishing non-competitive from competitive elections.

42. Using electoral history data from the Peterson report for Congressional district 12, I find that within the boundaries of the district that Peterson estimates that Democratic candidates won over 60 percent of the vote in two 1988 elections and the 1990 U.S. Senate election between Jesse Helms and Harvey Gantt. All of these percentages exceed the level needed to have a competitive Congressional district. These three percentages all confirm that district 12 is overly safe for both white and African-American candidates of the Democratic party in general elections.

43. I have also double-checked the calculations reported for recent elections in the Mortimer report. Using

whole county statistics, I confirm that Mortimer's report is correct. For example, I find that the Democratic candidate for Auditor Campbell, an African-American, won 63.5 percent of the vote in the 18 counties of northeastern North Carolina outlined in Exhibit E of the Mortimer report. This finding suggests that Congressional District 1 is also overly safe.

44. I have also analyzed the 1990 U.S. Senate Democratic primaries and general elections as well as the 1992 State Auditor Democratic primaries and general elections to estimate how much white cross-over is available to African-American candidates running statewide. I have isolated the analyses down to just the precincts contained in the 20 whole counties assigned to District 1 and the six whole counties assigned to District 12. Thus, I have consciously included adjacent areas not assigned to either District to achieve a conservative estimate of white cross-over.

45. For the 20 counties of the area of District 1, this analysis shows that white cross-over for an African-American candidate ranges from four to 35 percent in Democratic primaries and from 23 to 44 percent in general elections. The figures for the six counties of the area in District 12 show estimated white cross-over to range from 28 to 42 percent in Democratic primaries and from 37 to 38 percent in general elections. These white cross-over figures confirm that usually Democratic candidates who happen to be African-American can win enough white cross-over support to go along with

African-American voter support to win comfortably and safely in the areas of Districts 1 and 12 of the current North Carolina Congressional districting plan.

CONCLUSION

46. On the basis of my above analysis, I conclude:

1) that race was the predominant factor used by the state of North Carolina to draw the boundaries of the 1997 U.S. Congressional districts;

(2) that the state of North Carolina in creating the 1997 U.S. Congressional districting plan subordinated traditional race-neutral districting principles, such as compactness, contiguity, respect for political subdivisions or communities defined by actual shared interests, to racial considerations;

(3) that the African-American voting age population in North Carolina (particularly the northeastern part of the state) is not sufficiently large nor geographically concentrated enough to constitute a potential voter majority using traditional districting principles to draw a single-member Congressional district;

(4) that the majority-minority U.S. Congressional Districts 1 and 12 in the 1997 North Carolina plan is overly safe from the standpoint of giving a candidate of choice of African-American voters an opportunity to be elected, thus questioning whether the plan was narrowly tailored to satisfy a compelling state interest.

I declare under penalty of perjury that the forgoing is true and correct.

Executed on this twenty third day of March, 1998.

/s/ Ronald E. Weber

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
Eastern Division
Civil Action No. 04-CV-104-H2

MARTIN CROMARTIE, *et al.*,	)
	)
v.	)
	)
JAMES B. HUNT, JR., in his capacity as governor	)

AFFIDAVIT OF THOMAS A. DARLING

Thomas A. Darling, being first duly sworn, deposes and says:

1. I have a Ph.D. (1994) in Public Administration and Policy from the University at Albany, State University of New York. From 1996 to the present, I have been Assistant Professor of Government and Public Administration at the University of Baltimore. I also presently serve as Director, Government and Technology, at the William Donald Schaefer Center for Public Policy at the University of Baltimore. From 1994 to 1996, I was a Research Associate with the New York State Forum for Information Resources Management at the Rockefeller Institute of Government where I headed a project related to the electronic transmission of voter registration information and election results. I am co-author of three

articles in professional refereed journals. A current copy of my *curriculum vitae* is attached.

2. For the past two years, I have been working on a study of racial gerrymandering in the wake of *Shaw v. Reno*. My colleagues in this research are Dr. Carmen Cirincione, Assistant Professor of Political Science at the University of Connecticut and Dr. Timothy G. O'Rourke, Teresa M. Fischer Professor of Citizenship Education at the University of Missouri-St. Louis. To date, we have written three conference papers on our research, have one article under submission to a professional journal, and are preparing a second article for submission. Points 3 through 4 describe portions of this research as it relates specifically to North Carolina and these points are jointly subscribed to by my research colleagues in separate affidavits.

3. Drawing on the Supreme Court's racial gerrymandering jurisprudence (as set out in *Shaw I* and *II*, *Miller*, *Bush*, and *Abrams*), my colleagues and I have sought to answer the following question: What is the likelihood that a challenged district, with a given racial configuration, would emerge from a redistricting process that selected plans on the basis of traditional, race-neutral criteria? In a paper presented at the 1997 Annual Meeting of the American Political Science Association, we offered a computer-intensive methodology to answer this question. We applied the methodology to the analysis of 1991-92 congressional redistricting in five states: Alabama, Georgia, Mississippi, North Carolina, and South

Carolina. Attached to Dr. Cirincione's affidavit in this matter is a true copy of this paper, entitled "Does the Supreme Court Have It Right? Toward a Quantitative Standard for Evaluating Congressional Redistricting Plans After *Shaw v. Hunt* and *Bush v. Vera*." Paragraphs a-g below summarize the findings of the paper as they relate to the unconstitutional 1992 North Carolina congressional redistricting plan.

a. The methodology relies on computer programs, or algorithms, that are designed to create, at random, literally thousands of congressional districting plans for a given state. Our study uses four algorithms, each of which incorporates a different set of traditional districting criteria into the map drawing process. The *contiguity algorithm*, as the name suggests, creates contiguous districts of equal population -- building districts piece by piece, using census block groups as the basic unit of construction. (There are about 5,700 census block groups in North Carolina.) The *county integrity algorithm*, attempts to create districts that avoid dividing counties. The *compactness algorithm* ignores jurisdictional integrity and, instead, attempts to draw districts that are reasonably compact; for our purposes, that means districts that look like rectangles or boxes. The *county integrity and compactness* algorithm seeks to create compact districts comprised of whole counties (with county integrity given greater weight than compactness).

b. For each of the five states in our study, we generated 5,000 plans for each of the four algorithms. These 100,000 plans, with 820,000 districts provide a baseline against which we can judge redistricting plans actually adopted. Because our algorithms do not take race into account, their results can be used to assess whether an "adopted plan" has, in fact, subordinated traditional criteria to race. By comparing an adopted plan to randomly generated plans, we can estimate the likelihood that a plan with a specific number of black majority districts would emerge from a race-neutral redistricting process. If, for a particular state, the computer-generated plans do not contain as many black majority districts as the adopted plan, we can infer that the real mapmakers had to undertake a concerted effort to find such districts. Equally important, we can also assess whether an adopted plan elevates race over traditional criteria by comparing the characteristics of the adopted plan -- with respect, say, to county integrity and compactness -- to the characteristics of randomly generated plans. We assume that an adopted plan has been driven by racial considerations if it performs significantly worse on traditional criteria than the plans generated by our race-neutral algorithms.

c. For North Carolina, our study produced 5,000 plans for each of the four algorithms. Of the 240,000 districts in the 20,000 computer-generated districting plans, none is a majority African American majority district. In fact, the closest our algorithms came to producing a majority black district is a plan with a district containing a 47.1 percent black population (43.9

percent voting age population). Overall, 6,180 of the 20,000 the computer-generated plans contained a single African American influence district -- defined as one in which 40 percent or more of the population is African American. None of the computer-generated plans contained more than one influence district. It is clear that race was a factor in drawing the congressional districting plan in North Carolina. It is very difficult to draw a plan containing one, let alone two majority African American districts without considering race.

d. While the 1992 plan contained fewer split counties than all of the plans generated by the contiguity algorithm and most of the plans generated by the compactness algorithm, the 1992 plan divided more counties than all 10,000 plans created by the county integrity and county integrity/compactness algorithms. On average, these 10,000 plans split only 10.2 counties; the 1992 plan divided 44 counties, or four times as many counties as the average plan generated by our algorithms giving weight to county lines. Indeed, under the 1992 plan, District 1 by itself split 19 counties, while District 12 divided 10. Our computer analysis suggests that the 1992 map gave very little weight to the preservation of county lines.

e. With regard to compactness, none of the 240,000 computer-generated districts was as non-compact as District 12 in the 1992 plan. In contrast, one-third of the computer-generated plans contained at least one district as non-compact as District 1, according to our circle measure of compactness.

(See the text of the paper for a discussion of the compactness measures used for our analysis.) These findings plainly suggest that compactness was subordinated to race in the creation of District 12.

f. While the 1992 plan did not pair any incumbents, less than 5 percent of the computer-generated plans did not do so -- indicating that incumbency protection was a criterion in the map drawing process. But it must be noted that none of the computer-generated plans without paired incumbents contained any majority black districts. Thus, while the 1992 plan might have weighted incumbency, race appears to have been a more important factor.

g. Our findings led us to conclude, for North Carolina, that "it is very difficult, if not impossible, to draw two African American majority districts and to adhere to traditional districting principles such as compactness and jurisdictional integrity. Beyond this point, moreover, it is highly unlikely that strict adherence to a race neutral redistricting process would yield even a single majority African American district, let alone two." (By way of contrast, our study concluded that "a race-neutral redistricting process could produce a black majority district" in Alabama and that there is "a fairly strong likelihood that race-neutral redistricting would lead to the creation of an African American majority district" in Mississippi.)

4. The findings in the 1997 APSA Paper have relevance for the evaluation of the 1998 North Carolina congressional plan.

a. Race is a driving force in the 1998 North Carolina congressional plan. As noted above, a race-neutral redistricting process is not likely to yield a congressional plan with a single majority black district or to lead to a plan with two 40-percent black districts. The 1998 plan contains both a 50.3 percent black district (the 1st) and a 46.7 percent black district (the 12th). These figures indicate that race was given substantial weight in the configuration of districts.

b. In our 1997 study, the algorithms taking county integrity into account split, on average, only 10 counties. (Though not reported in the paper, the two algorithms giving weight to county lines, at most, divided only 11 counties; some plans split as few as 6 counties.) The 1998 plan splits 22 counties. Moreover, 16 of the 22 divided counties are associated with District 1 (which splits 10 of its 20 counties) and District 12 (which divides up all 6 of its constituent counties). Thus, the 1998 plan divides counties unnecessarily and the excessive division is closely linked to the preservation of substantial black population percentages in Districts 1 and 12.

c. In 1992, there were only six states in which congressional district lines split as many as 10 counties. These

states were Florida (District 3), Georgia (2, 8), Louisiana (4, 5, 6), North Carolina (1, 3, 10, 12), South Carolina (6), and Virginia (3). (These data are reported in David C. Huckabee, *Congressional Districts: Objectively Evaluating Shapes* (Washington, DC: Congressional Research Service, Library of Congress, 1994), Appendix B.) Since 1992, courts have invalidated racially gerrymandering district lines in every one of these states, except South Carolina. Revised plans have substantially reduced instances of split counties; thus, the remedial order of the district court in Georgia, upheld in *Abrams*, reduced the number of divided counties in the Georgia congressional map to 6, as compared to 26 in the invalidated 1992 map. Similarly, revised district lines in Louisiana split only six parishes overall. In sharp contrast, the 1998 North Carolina plan divides 10 counties in District 1 alone and 22 counties overall, strongly suggesting that county integrity has been sacrificed to other considerations.

d. Among 1992 congressional districts, North Carolina's 12th District had a dispersion score of .045 (433 out of 435) and a perimeter score of .014 (431 out of 435). (Scores for all states appear in Huckabee, Appendix A. The dispersion measure is the ratio of the area of the district to the smallest circumscribing circle. The perimeter measure is the ratio of the area of the district to the area of a circle with the same perimeter as the district.) The 1998 version of District 12 has a dispersion score of .109 and a perimeter score of .041. If the 1992 rankings had remained unchanged, the new version of the

12th would still stand as the 430th least compact district on the dispersion measure and it would rank 423 on the perimeter measure. Plainly stated, the 12th District remains one of the very least compact congressional districts in the nation.

This the 23d day of March, 1998.

/s/ Thomas A. Darling

Sworn to and subscribed before me this
23d day of March, 1998.

/s/ [illegible]
Notary Public

My commission expires 07/01/2001

[This page intentionally left blank]

AFFIDAVIT OF CARMEN CIRCINCIONE (WITHOUT ATTACHMENTS) (CD 59)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
Eastern Division
Civil Action No. 04-CV-104-H2

MARTIN CROMARTIE, *et al.*,	)
	)
v.	)
	)
JAMES B. HUNT, JR., in his official capacity as governor	)

AFFIDAVIT OF CARMEN CIRINCIONE

Carmen Cirincione, being first duly sworn deposes and says:

1. I hold a Ph.D. in Public Administration and Policy (1992) from the State University of New York at Albany. From 1994 to the present, I have been Assistant Professor of Political Science at the University of Connecticut (Storrs); from 1992 to 1994, I was Assistant Professor of Political Science at Clemson University. I am the co-author of a scholarly book and author or co-author of eight articles in professional journals. A current copy of my *curriculum vitae* is attached.

2. For the past two years, I have been working on a study of racial gerrymandering in the wake of *Shaw v. Reno*. My colleagues in this research are Dr. Thomas Darling. Assistant

Professor of Government and Public Administration at the University of Baltimore and Dr. Timothy G. O'Rourke, Teresa M. Fischer Professor of Citizenship Education at the University of Missouri-St. Louis. To date, we have written three conference papers on our research, have one article under submission to a professional journal, and are preparing a second article for submission. Points 3 through 4 describe portions of this research as it relates specifically to North Carolina and these points are jointly subscribed to by my research colleagues in separate affidavits.

3. Drawing on the Supreme Court's racial gerrymandering jurisprudence (as set out in *Shaw I* and *II*, *Miller*, *Bush*, and *Abrams*), my colleagues and I have sought to answer the following question: What is the likelihood that a challenged district, with a given racial configuration, would emerge from a redistricting process that selected plans on the basis of traditional, race-neutral criteria? In a paper presented at the 1997 Annual Meeting of the American Political Science Association, we offered a computer-intensive methodology to answer this question. We applied the methodology to the analysis of 1991-92 congressional redistricting in five states: Alabama, Georgia, Mississippi, North Carolina, and South Carolina. Attached to this affidavit is a true copy of this paper, entitled "Does the Supreme Court Have It Right? Toward a Quantitative Standard for Evaluating Congressional Redistricting Plans After *Shaw v. Hunt* and *Bush v. Vera*." Paragraphs a-g below summarize the findings of the paper as

they relate to the unconstitutional 1992 North Carolina congressional redistricting plan.

a. The methodology relies on computer programs, or algorithms, that are designed to create, at random, literally thousands of congressional districting plans for a given state. Our study uses four algorithms, each of which incorporates a different set of traditional districting criteria into the map drawing process. The *contiguity algorithm*, as the name suggests, creates contiguous districts of equal population -- building districts piece by piece, using census block groups as the basic unit of construction. (There are about 5,700 census block groups in North Carolina.) The *county integrity algorithm*, attempts to create districts that avoid dividing counties. The *compactness algorithm* ignores jurisdictional integrity and, instead, attempts to draw districts that are reasonably compact; for our purposes, that means districts that look like rectangles or boxes. The *county integrity and compactness* algorithm seeks to create compact districts comprised of whole counties (with county integrity given greater weight than compactness).

b. For each of the five states in our study, we generated 5,000 plans for each of the four algorithms. These 100,000 plans, with 820,000 districts, provide a baseline against which we can judge redistricting plans actually adopted. Because our algorithms do not take race into account, their results can be used to assess whether an "adopted plan" has, in

fact, subordinated traditional criteria to race. By comparing an adopted plan to randomly generated plans, we can estimate the likelihood that a plan with a specific number of black majority districts would emerge from a race-neutral redistricting process. If, for a particular state, the computer-generated plans do not contain as many black majority districts as the adopted plan, we can infer that the real mapmakers had to undertake a concerted effort to find such districts. Equally important, we can also assess whether an adopted plan elevates race over traditional criteria by comparing the characteristics of the adopted plan -- with respect, say, to county integrity and compactness -- to the characteristics of randomly generated plans. We assume that an adopted plan has been driven by racial considerations if it performs significantly worse on traditional criteria than the plans generated by our race-neutral algorithms.

c. For North Carolina, our study produced 5,000 plans for each of the four algorithms. Of the 240,000 districts in the 20,000 computer-generated districting plans, none is a majority African American majority district. In fact, the closest our algorithms came to producing a majority black district is a plan with a district containing a 47.1 percent black population (43.9 percent voting age population). Overall, 6,180 of the 20,000 the computer-generated plans contained a single African American influence district -- defined as one in which 40 percent or more of the population is African American. None of the computer-generated plans contained more than one influence district. It is clear that race was a factor in drawing

the congressional districting plan in North Carolina. It is very difficult to draw a plan containing one, let alone two majority African American districts without considering race.

d. While the 1992 plan contained fewer split counties than all of the plans generated by the contiguity algorithm and most of the plans generated by the compactness algorithm, the 1992 plan divided more counties than all 10,000 plans created by the county integrity and county integrity/compactness algorithms. On average, these 10,000 plans split only 10.2 counties; the 1992 plan divided 44 counties, or four times as many counties as the average plan generated by our algorithms giving weight to county lines. Indeed, under the 1992 plan, District 1 by itself split 19 counties, while District 12 divided 10. Our computer analysis suggests that the 1992 map gave very little weight to the preservation of county lines.

e. With regard to compactness, none of the 240,000 computer-generated districts was as non-compact as District 12 in the 1992 plan. In contrast, one-third of the computer-generated plans contained at least one district as non-compact as District 1, according to our circle measure of compactness. (See the text of the paper for a discussion of the compactness measures used for our analysis.) These findings plainly suggest that compactness was subordinated to race in the creation of District 12.

f. While the 1992 plan did not pair any incumbents, less than 5 percent of the computer-generated plans did not do so -- indicating that incumbency protection was a criterion in the map drawing process. But it must be noted that none of the computer-generated plans without paired incumbents contained any majority black districts. Thus, while the 1992 plan might have weighted incumbency, race appears to have been a more important factor.

g. Our findings led us to conclude, for North Carolina, that "it is very difficult, if not impossible, to draw two African American majority districts and to adhere to traditional districting principles such as compactness and jurisdictional integrity. Beyond this point, moreover, it is highly unlikely that strict adherence to a race neutral redistricting process would yield even a single majority African American district, let alone two." (By way of contrast, our study concluded that "a race-neutral redistricting process could produce a black majority district" in Alabama and that there is "a fairly strong likelihood that race-neutral redistricting would lead to the creation of an African American majority district" in Mississippi.)

4. The findings in the 1997 APSA Paper have relevance for the evaluation of the 1998 North Carolina congressional plan.

a. Race is a driving force in the 1998 North Carolina congressional plan. As noted above, a race-neutral redistricting process is not likely to yield a congressional plan with a single majority black district or to lead to a plan with two 40-percent black districts. The 1998 plan contains both a 50.3 percent black district (the 1st) and a 46.7 percent black district (the 12th). These figures indicate that race was given substantial weight in the configuration of districts.

b. In our 1997 study, the algorithms taking county integrity into account split, on average, only 10 counties. (Though not reported in the paper, the two algorithms giving weight to county lines, at most, divided only 11 counties; some plans split as few as 6 counties.) The 1998 plan splits 22 counties. Moreover, 16 of the 22 divided counties are associated with District 1 (which splits 10 of its 20 counties) and District 12 (which divides up all 6 of its constituent counties). Thus, the 1998 plan divides counties unnecessarily and the excessive division is closely linked to the preservation of substantial black population percentages in Districts 1 and 12.

c. In 1992, there were only six states in which congressional district lines split as many as 10 counties. These states were Florida (District 3), Georgia (2, 8), Louisiana (4, 5, 6), North Carolina (1, 3, 10, 12), South Carolina (6), and Virginia (3). (These data are reported in David C. Huckabee, *Congressional Districts: Objectively Evaluating Shapes*

(Washington, DC: Congressional Research Service, Library of Congress, 1994), Appendix B.) Since 1992, courts have invalidated racially gerrymandering district lines in every one of these states, except South Carolina. Revised plans have substantially reduced instances of split counties; thus, the remedial order of the district court in Georgia, upheld in *Abrams*, reduced the number of divided counties in the Georgia congressional map to 6, as compared to 26 in the invalidated 1992 map. Similarly, revised district lines in Louisiana split only six parishes overall. In sharp contrast, the 1998 North Carolina plan divides 10 counties in District 1 alone and 22 counties overall, strongly suggesting that county integrity has been sacrificed to other considerations.

d. Among 1992 congressional districts, North Carolina's 12th District had a dispersion score of .045 (433 out of 435) and a perimeter score of .014 (431 out of 435). (Scores for all states appear in Huckabee, Appendix A. The dispersion measure is the ratio of the area of the district to the smallest circumscribing circle. The perimeter measure is the ratio of the area of the district to the area of a circle with the same perimeter as the district.) The 1998 version of District 12 has a dispersion score of .109 and a perimeter score of .041. If the 1992 rankings had remained unchanged, the new version of the 12th would still stand as the 430th least compact district on the dispersion measure and it would rank 423 on the perimeter measure. Plainly stated, the 12th District remains one of the very least compact congressional districts in the nation.

This the 23rd day of March, 1998.

/s/ Carmen Cirincione

Sworn to and subscribed before me this
23rd day of March, 1998.

/s/ [illegible]
Notary Public

My commission expires 06-30-2002

[This page intentionally left blank]

[This page intentionally left blank]

AFFIDAVIT OF TIMOTHY O'ROURKE (WITHOUT ATTACHMENTS) (CD 60)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
Eastern Division
Civil Action No. 04-CV-104-H2

MARTIN CROMARTIE, *et al.*,	)
	)
v.	)
	)
JAMES B. HUNT, JR., in his capacity as governor	)

AFFIDAVIT OF TIMOTHY G. O'ROURKE

Timothy G. O'Rourke, being first duly sworn, deposes and says:

1. I have a Ph.D. (1977) in political science from Duke University. I presently serve as the Teresa M. Fischer Professor of Citizenship Education at the University of Missouri-St. Louis: in that position, I hold a joint appointment as professor in the Department of Educational Leadership and Policy Studies and in the Department of Political Science. From 1992 to 1995, I was professor and chair of the Department of Political Science at Clemson University, and, before that, held academic appointments at the University of Virginia and Campbell College (now University) in North Carolina. For two decades, I have been studying and writing about representation and redistricting issues. My published

work includes *The Impact of Reapportionment* (1980), named by *CHOICE* as one of the Outstanding Academic Books of 1980; articles on the federal Voting Rights Act in the *Virginia Law Review*, the *University of Richmond Law Review*, and *Journal of Law and Politics*; and a chapter in Bernard Groffman and Chandler Davidson's *Controversies in Minority Voting: The Voting Rights Act in Perspective* (Brookings Institution, 1992). I have written specifically about North Carolina's now invalidated 1992 congressional redistricting plan in "*Shaw v. Reno*: The Shape of Things to Come," *26 Rutgers Law Journal·723-73* (1995); and "*Shaw v. Reno* and the *Hunt* for Double Cross-Overs," *28 PS: Political Science and Politics 36-41* (1995). I have testified before both U.S. House and Senate committees on various representational questions and have served as an expert witness in voting rights litigation, including the 1994 trial of *Shaw v. Hunt*. My testimony in the Georgia racial gerrymandering case was credited by the U.S. Supreme Court in its 1995 decision in *Miller v. Johnson*. Since the early 1980s, I have regularly taught a graduate/undergraduate political science course entitled "Voting Rights and Representation." A current copy of my *curriculum vitae* is attached.

2. For the past two years, I have been working on a study of racial gerrymandering in the wake of *Shaw v. Reno*. My colleagues in this research are Dr. Carmen Cirincione, Assistant Professor of Political Science at the University of Connecticut and Dr. Thomas Darling, Assistant Professor of Government

and Public Administration at the University of Baltimore. To date, we have written three conference papers on our research, have one article under submission to a professional journal, and are preparing a second article for submission. Points 3 through 4 describe portions of this research as it relates specifically to North Carolina and these points are jointly subscribed to by my research colleagues in separate affidavits.

3. Drawing on the Supreme Court's racial gerrymandering jurisprudence (as set out in *Shaw I* and *II*, *Miller*, *Bush*, and *Abrams*), my colleagues and I have sought to answer the following question: What is the likelihood that a challenged district, with a given racial configuration, would emerge from a redistricting process that selected plans on the basis of traditional, race-neutral criteria? In a paper presented at the 1997 Annual Meeting of the American Political Science Association, we offered a computer-intensive methodology to answer this question. We applied the methodology to the analysis of 1991-92 congressional redistricting in five states: Alabama, Georgia, Mississippi, North Carolina, and South Carolina. Attached to this affidavit is a true copy of this paper, entitled "Does the Supreme Court Have It Right? Toward a Quantitative Standard for Evaluating Congressional Redistricting Plans After *Shaw v. Hunt* and *Bush v. Vera*." Paragraphs a-g below summarize the findings of the paper as they relate to the unconstitutional 1992 North Carolina congressional redistricting plan.

a. The methodology relies on computer programs, or algorithms, that are designed to create, at random, literally thousands of congressional districting plans for a given state. Our study uses four algorithms, each of which incorporates a different set of traditional districting criteria into the map drawing process. The *contiguity algorithm*, as the name suggests, creates contiguous districts of equal population -- building districts piece by piece, using census block groups as the basic unit of construction. (There are about 5,700 census block groups in North Carolina.) The *county integrity algorithm*, attempts to create districts that avoid dividing counties. The *compactness algorithm* ignores jurisdictional integrity and, instead, attempts to draw districts that are reasonably compact; for our purposes, that means districts that look like rectangles or boxes. The *county integrity and compactness* algorithm seeks to create compact districts comprised of whole counties (with county integrity given greater weight than compactness).

b. For each of the five states in our study, we generated 5,000 plans for each of the four algorithms. These 100,000 plans, with 820,000 districts, provide a baseline against which we can judge redistricting plans actually adopted. Because our algorithms do not take race into account, their results can be used to assess whether an "adopted plan" has, in fact, subordinated traditional criteria to race. By comparing an adopted plan to randomly generated plans, we can estimate the likelihood that a plan with a specific number of black majority

districts would emerge from a race-neutral redistricting process. If, for a particular state, the computer-generated plans do not contain as many black majority districts as the adopted plan, we can infer that the real mapmakers had to undertake a concerted effort to find such districts. Equally important, we can also assess whether an adopted plan elevates race over traditional criteria by comparing the characteristics of the adopted plan -- with respect, say, to county integrity and compactness -- to the characteristics of randomly generated plans. We assume that an adopted plan has been driven by racial considerations if it performs significantly worse on traditional criteria than the plans generated by our race-neutral algorithms.

c. For North Carolina, our study produced 5,000 plans for each of the four algorithms. Of the 240,000 districts in the 20,000 computer-generated districting plans, none is a majority African American majority district. In fact, the closest our algorithms came to producing a majority black district is a plan with a district containing a 47.1 percent black population (43.9 percent voting age population). Overall, 6,180 of the 20,000 the computer-generated plans contained a single African American influence district -- defined as one in which 40 percent or more of the population is African American. None of the computer-generated plans contained more than one influence district. It is clear that race was a factor in drawing the congressional districting plan in North Carolina. It is very difficult to draw a plan containing one, let alone two majority African American districts without considering race.

d. While the 1992 plan contained fewer split counties than all of the plans generated by the contiguity algorithm and most of the plans generated by the compactness algorithm, the 1992 plan divided more counties than all 10,000 plans created by the county integrity and county integrity/compactness algorithms. On average, these 10,000 plans split only 10.2 counties; the 1992 plan divided 44 counties, or four times as many counties as the average plan generated by our algorithms giving weight to county lines. Indeed, under the 1992 plan, District 1 by itself split 19 counties, while District 12 divided 10. Our computer analysis suggests that the 1992 map gave very little weight to the preservation of county lines.

e. With regard to compactness, none of the 240,000 computer-generated districts was as non-compact as District 12 in the 1992 plan. In contrast, one-third of the computer-generated plans contained at least one district as non-compact as District 1, according to our circle measure of compactness. (See the text of the paper for a discussion of the compactness measures used for our analysis.) These findings plainly suggest that compactness was subordinated to race in the creation of District 12.

f. While the 1992 plan did not pair any incumbents, less than 5 percent of the computer-generated plans did not do so -- indicating that incumbency protection was a criterion in the map drawing process. But it must be noted that none of the computer-generated plans without paired incumbents contained

any majority black districts. Thus, while the 1992 plan might have weighted incumbency, race appears to have been a more important factor.

g. Our findings led us to conclude, for North Carolina, that "it is very difficult, if not impossible, to draw two African American majority districts and to adhere to traditional districting principles such as compactness and jurisdictional integrity. Beyond this point, moreover, it is highly unlikely that strict adherence to a race neutral redistricting process would yield even a single majority African American district, let alone two." (By way of contrast, our study concluded that "a race-neutral redistricting process could produce a black majority district" in Alabama and that there is "a fairly strong likelihood that race-neutral redistricting would lead to the creation of an African American majority district" in Mississippi.)

4. The findings in the 1997 APSA Paper have relevance for the evaluation of the 1998 North Carolina congressional plan.

a. Race is a driving force in the 1998 North Carolina congressional plan. As noted above, a race-neutral redistricting process is not likely to yield a congressional plan with a single majority black district or to lead to a plan with two 40-percent black districts. The 1998 plan contains both a 50.3 percent black district (the 1st) and a 46.7 percent black district (the

12th). These figures indicate that race was given substantial weight in the configuration of districts.

b. In our 1997 study, the algorithms taking county integrity into account split, on average, only 10 counties. (Though not reported in the paper, the two algorithms giving weight to county lines, at most, divided only 11 counties; some plans split as few as 6 counties.) The 1998 plan splits 22 counties. Moreover, 16 of the 22 divided counties are associated with District 1 (which splits 10 of its 20 counties) and District 12 (which divides up all 6 of its constituent counties). Thus, the 1998 plan divides counties unnecessarily and the excessive division is closely linked to the preservation of substantial black population percentages in Districts 1 and 12.

c. In 1992, there were only six states in which congressional district lines split as many as 10 counties. These states were Florida (District 3), Georgia (2, 8), Louisiana (4, 5, 6), North Carolina (1, 3, 10, 12), South Carolina (6), and Virginia (3). (These data are reported in David C. Huckabee, *Congressional Districts: Objectively Evaluating Shapes* (Washington, DC: Congressional Research Service, Library of Congress, 1994), Appendix B.) Since 1992, courts have invalidated racially gerrymandering district lines in every one of these states except South Carolina. Revised plans have substantially reduced instances of split counties; thus, the remedial order of the district court in Georgia, upheld in

Abrams, reduced the number of divided counties in the Georgia congressional map to 6, as compared to 26 in the invalidated 1992 map. Similarly, revised district lines in Louisiana split only six parishes overall. In sharp contrast, the 1998 North Carolina plan divides 10 counties in District 1 alone and 22 counties overall, strongly suggesting that county integrity has been sacrificed to other considerations.

d. Among 1992 congressional districts, North Carolina's 12th District had a dispersion score of .045 (433 out of 435) and a perimeter score of .014 (431 out of 435). (Scores for all states appear in Huckabee, Appendix A. The dispersion measure is the ratio of the area of the district to the smallest circumscribing circle. The perimeter measure is the ratio of the area of the district to the area of a circle with the same perimeter as the district.) The 1998 version of District 12 has a dispersion score of .109 and a perimeter score of .041. If the 1992 rankings had remained unchanged, the new version of the 12th would still stand as the 430th least compact district on the dispersion measure and it would rank 423 on the perimeter measure. Plainly stated, the 12th District remains one of the very least compact congressional districts in the nation.

5. Readily observable characteristics of Districts 1 and 12 reveal that traditional redistricting principles were subordinated to race in the configuration of those districts.

a. Apart from being oddly shaped, District 12 is the only district, among 12, that contains no "whole" counties. District 12 not only divides six counties, it also splits the populations of eight cities (Charlotte, Greensboro, High Point, Lexington, Salisbury, Statesville, Thomasville, and Winston-Salem) and several towns.

b. In the counties District 12 traverses, it takes in nearly every precinct with a black population in excess of 40 percent (according to a map prepared by plaintiffs' counsel on the General Assembly's public access terminal).

c. District 12 bisects Mecklenburg County, whose population (511,433) makes it nearly large enough to be a district by itself. As a consequence of the configuration of District 12, the District 9 portion of Mecklenburg County is divided between western and eastern wings, tied together by a strip of land less than two miles wide (District 9 stretches over 1171 square miles). This band is the result of splitting Charlotte Precinct 77 -- one of only two precincts split by the redistricting plan. Precinct 77 contains 3,461 persons, 86 percent of whom are black. The 1998 redistricting plan attaches the northern half of Precinct 77 and all but one of its 3,461 persons to District 12 and leaves the southern half of the precinct -- and but a single person -- to provide the essential connecting link between the two wings of District 9. The splitting of Precinct 77 closely resembles what the Supreme Court condemned in *Miller v. Johnson*, 63 U.S.L.W. 4726, at

4728, 4730-31 (1995), that is, the use of "land bridges" and split precincts in order to effect a sorting out of persons along racial lines.

d. Districts 1 and 3 are "interwoven," with District 1 sending two long tentacles into the southern section of District 3. District 1, aside from splitting 10 of its 20 counties, divides the populations of six cities (Goldsboro, Greenville, Kinston, New Bern, Washington, and Wilson) and several towns.

This the 23d day of March, 1998.

/s/ Timothy G. O'Rourke

Sworn to and subscribed before me this
23d day of March, 1998.

/s/ Lois Raley
Notary Public

My commission expires: 11-19-01

LOIS RALEY
Notary Public - State of Missouri
City of St. Louis
My Commission Expires Nov. 19, 2001

[This page intentionally left blank]

AFFIDAVIT OF MARTIN B. MCGEE (WITH ALL ATTACHMENTS EXCEPT MAPS (EXHIBITS M, N, O & P WHICH WERE LODGED WITH THE COURT ON AUGUST 27, 1998 AS MAPS 1, 2, 3 & 4)) (CD 61)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
RALEIGH DIVISION
Civil Action No. 4.96-CV-104-BO(3)

MARTIN CROMARTIE, *et al.*, Plaintiffs,	)
vs.	)
JAMES B. HUNT, JR., in his official capacity as Governor of the State North Carolina, *et al.*, Defendants.	)

AFFIDAVIT OF MARTIN B. McGEE

Martin B. McGee, being duly sworn, deposes and declares:

I am a resident of Cabarrus County, where I practice law in Concord, NC with the firm of Williams, Boger, Grady, Davis and Tittle, P.A. I am also one of the attorneys for the plaintiffs in this action and in the recent past have had primary responsibility for plaintiffs' representation due to the surgery and convalescence of my co-counsel, Robinson O. Everett.

In the course of my preparation for submission of a reply to the Defendants' motion for summary judgment, I had occasion to obtain from the public access office of the General Assembly maps and various supporting data relating to the 1997 congressional redistricting plan. I am attaching herewith various Exhibits which I have obtained from Dan Frey, GIS Analyst, with the North Carolina Assembly.

1. Exhibit A- Demographic information related to Precinct 11 in Guilford County.

2. Exhibit B- Demographic information related to Precinct 14 in Guilford County.

3. Exhibit C- Demographic information related to Precinct 17 in Guilford County.

4. Exhibit D- Demographic information related to the Brunson Elementary School Precinct (1408) in Forsyth County.

5. Exhibit E- Demographic information related to the Hanes Community Center Precinct (1422) in Forsyth County.

6. Exhibit F- Demographic information related to the Latham Elementary School Precinct (1427) in Forsyth County.

7. Exhibit G- Demographic information related to Charlotte Precinct 10 in Mecklenburg County.

8. Exhibit H- Demographic information related to Charlotte Precinct 21 in Mecklenburg County.

9. Exhibit I- Demographic information related to Charlotte Precinct 38 in Mecklenburg County.

10. Exhibit J- Demographic information related to Charlotte Precinct 77 in Mecklenburg County.

11. Exhibit K- A list of precincts split by 1997 congressional districts.

12. Exhibit L- A list of towns and cities split by 1997 congressional districts.

13. Exhibit M- Map of Twelfth District shaded by minority concentrations.

14. Exhibit N- Map of Guilford County shaded by minority concentrations and marked by Democratic registration.

15. Exhibit O- Map of Forsyth County shaded by minority concentrations and marked by Democratic registration.

16. Exhibit P- Map of Mecklenburg County shaded by minority concentrations and marked by Democratic registration.

Further affiant sayeth not.

/s/ Martin B. McGee

Subscribed and sworn to before me
this 23rd day of March, 1998.

/s/ Anita Robinson
Notary Public Expires 10-28-2002

Population of GB-11*(0111) **McGee Ex A**

Guilford County (81)
GB-11 * (0111)

Area:	0.8215 sq.mi.
Perimeter:	4.2708 mi.
Assigned to:	6
Units number:	205714
Total Pop.:	2,015 (100%)
White Pop.:	1,625 (80.65%)
Black Pop.:	354 (17.57%)
Am. Indian Pop.:	12 (0.60%)
Asian Pop.:	17 (0.84%)
Other Population:	7 (0.35%)
Hispanic Pop.:	25 (1.24%)
Total Voting Age Pop.:	1,828 (90.72%)
White Voting Age Pop.:	1,466 (80.20%)
Black Voting Age Pop:	327 (17.89%)
Am. Indian Voting Age	Pop.: 11 (0.60%)
Asian Voting Age Pop.:	17 (0.93%)
Other Voting Age Pop.:	7 (0.38%)
Hispanic Voting Age Pop.:	25 (1.37%)
Total Registered Voters:	1,420 (70.47%)
Registered Whites:	1,262 (88.87%)
Registered Blacks:	154 (10.85%)
Registered Others:	4 (0.28%)
Democrats:	885 (62.32%)
Republican:	400 (28.17%)

Unaffiliated:	135 (9.51%)
Senatorial Race, Dem. 1990:	505 (67.51%)
Senatorial Race, Rep. 1990:	243 (32.49%)
Lt. Gov., Dem. 1988:	449 (61.68%)
Lt. Gov., Rep. 1988:	279 (38.32%)
Ct. of Appeals, Dem. 1988:	347 (52.98%)
Ct. of Appeals, Rep.1988:	308 (47.02%)

Population of GB-14*(0114) **McGee Ex B**

Guilford County (81)
GB-14 *(0114)

Area:	0.6573 sq.mi.
Perimeter:	3.4115 mi.
Assigned to:	6
Units number:	203595
Total Pop.:	5,417 (100%)
White Pop.,.	4,478 (82.67%)
Black Pop.:	823 (15.19%)
Am. Indian Pop.:	25 (0.46%)
Asian Pop.:	69 (1.27%)
Other Population:	22 (0.41%)
Hispanic Pop.:	67 (1.24%)
Total Voting Age Pop.:	5,307 (97.97%)
White Voting Age Pop.:	4,385 (82.63%)
Black Voting Age Pop:	809 (15.24%)
Am. Indian Voting Age Pop.:	25 (0.47%)
Asian Voting Age Pop.:	67 (1.26%)
Other Voting Age Pop.:	21 (0.40%)
Hispanic Voting Age Pop.:	66 (1.24%)
Total Registered Voters:	3,536 (65.28%)
Registered Whites:	2,737 (77.40%)
Registered Blacks:	776 (21.95%)
Registered Others:	23 (0.65%)
Democrats:	2,056 (58.14%)
Republican:	930 (26.30%)

Unaffiliated:	550 (15.55%)
Senatorial Race, Dem. 1990:	1,434 (86.91%)
Senatorial Race, Rep. 1990:	216 (13.09%)
Lt. Gov., Dem. 1988:	870 (65.66%)
Lt. Gov., Rep. 1988:	455 (34.34%)
Ct. of Appeals, Dem. 1988:	776 (63.92%)
Ct. of Appeals, Rep.1988:	438 (36.08%)

Population of GB-17*(0117) **McGee Ex C**

Guilford County (81)
GB-17 * (0117)

Area:	1.0335 sq.mi.
Perimeter:	5.3999 mi.
Assigned to:	6
Units number:	203308
Total Pop.:	3,552 (100%)
White Pop.:	3,021 (85.05%)
Black Pop.:	323 (9.09%)
Am. Indian Pop.:	19 (0.53%)
Asian Pop.:	184 (5.18%)
Other Population:	5 (0.14%)
Hispanic Pop.:	44 (1.24%)
Total Voting Age Pop.:	3,077 (86.63%)
White Voting Age Pop.:	2,673 (86.87%)
Black Voting Age Pop:	266 (8.64%)
Am. Indian Voting Age Pop.:	13 (0.42%)
Asian Voting Age Pop.:	123 (4.00%)
Other Voting Age Pop.:	2 (0.06%)
Hispanic Voting Age Pop.:	36 (1.17%)
Total Registered Voters:	2,365 (66.58%)
Registered Whites:	2,174 (91.92%)
Registered Blacks:	180 (7.61%)
Registered Others:	11 (0.47%)
Democrats:	1,463 (61.86%)
Republican:	677 (28.63%)

Unaffiliated:	225 (9.51%)
Senatorial Race, Dem. 1990:	777 (65.08%)
Senatorial Race, Rep. 1990:	417 (34.92%)
Lt. Gov., Dem. 1988:	713 (61.68%)
Lt. Gov., Rep. 1988:	443 (38.32%)
Ct. of Appeals, Dem. 1988:	604 (58.19%)
Ct. of Appeals, Rep. 1988:	434 (41.81%)

Population of Brunson Elementary School*(1408)

McGee Ex D

Forsyth County (67)	
Brunson Elementary School * (1408)	
Area:	0.5383 sq.mi.
Perimeter:	4.4986 mi.
Assigned to:	5
Units number:	19491
Total Pop.:	2,303 (100%)
White Pop.:	1,630 (70.78%)
Black Pop.:	641 (27.83%)
Am. Indian Pop.:	4 (0.17%)
Asian Pop.:	25 (1.09%)
Other Population:	3 (0.13%)
Hispanic Pop.:	30 (1.30%)
Total Voting Age Pop.:	1,986 (86.24%)
White Voting Age Pop.:	1,448 (72.91%)
Black Voting Age Pop:	514 (25.88%)
Am. Indian Voting Age Pop.:	4 (0.20%)
Asian Voting Age Pop.:	17 (0.86%)
Other Voting Age Pop.:	3 (0.15%)
Hispanic Voting Age Pop.:	23 (1.16%)
Total Registered Voters:	1,413 (61.35%)
Registered Whites:	1,147 (81.17%)
Registered Blacks:	260 (18.40%)
Registered others:	6 (0.42%)
Democrats:	929 (65.75%)

Republican:	316 (22.36%)
Unaffiliated:	168 (11.89%)
Senatorial Race, Dem. 1990:	572 (75.46%)
Senatorial Race, Rep. 1990:	186 (24.54%)
Lt. Gov., Dem. 1988:	537 (66.30%)
Lt. Gov., Rep. 1988:	273 (33.70%)
Ct. of Appeals, Dem.1988:	478 (65.84%)
Ct. of Appeals, Rep. 1988:	248 (34.16%)

Population of Hanes Community Center*(1422)

McGee Ex E

Forsyth County (67)	
Hanes Community Center * (1422)	
Area:	2.3607 sq.mi.
Perimeter:	6.6935 mi.
Assigned to:	5
Units number:	18116
Total Pop.:	6,044 (100%)
White Pop.:	4,029 (66.66%)
Black Pop.:	1,938 (32.06%)
Am. Indian Pop.:	8 (0.13%)
Asian Pop.:	56 (0.93%)
Other Population:	13 (0.22%)
Hispanic Pop.:	46 (0.76%)
Total Voting Age Pop.:	5,473 (90.55%)
White Voting Age Pop.:	3,825 (69.89%)
Black Voting Age Pop:	1,576 (28.80%)
Am. Indian Voting Age Pop.:	7 (0.13%)
Asian Voting Age Pop.:	54 (0.99%)
Other Voting Age Pop.:	11 (0.20%)
Hispanic Voting Age Pop.:	38 (0.69%)
Total Registered Voters:	2,375 (39.30%)
Registered Whites:	1,369 (57.64%)
Registered Blacks:	1,004 (42.27%)
Registered Others:	2 (0.08%)
Democrats:	1,805 (76%)

Republican:	461 (19.41%)
Unaffiliated:	109 (4.59%)
Senatorial Race, Dem. 1990:	1,182 (75.77%)
Senatorial Race, Rep. 1990:	378 (24.23%)
Lt. Gov., Dem. 1988:	1,101 (71.68%)
Lt. Gov., Rep. 1988:	435 (28.32%)
Ct. of Appeals, Dem. 1988:	909 (69.18%)
Ct. of Appeals, Rep. 1988:	405 (30.82%)

Population of Latham Elementary School*(1427)

McGee Ex F

Forsyth County (67)	
Latham Elementary School * (1427)	
Area:	1.2612 sq. mi.
Perimeter:	4.7609 mi.
Assigned to:	5
Units number:	16612
Total Pop.:	2,955 (100%)
White Pop.:	2,249 (78.77%)
Black Pop.:	566 (19.82%)
Am. Indian Pop.:	20 (0.70%)
Asian Pop.:	18 (0.63%)
Other Population:	2 (0.07%)
Hispanic Pop.:	10 (0.35%)
Total Voting Age Pop.:	2,332 (81.68%)
White Voting Age Pop.:	1,895 (81.26%)
Black Voting Age Pop:	406 (17.41%)
Am. Indian Voting Age Pop.:	13 (0.56%)
Asian Voting Age Pop.:	16 (0.69%)
Other Voting Age Pop.:	2 (0.09%)
Hispanic Voting Age Pop.:	7 (0.30%)
Total Registered Voters:	1,603 (56.15%)
Registered Whites:	1,387 (86.53%)
Registered Blacks:	212 (13.23%)
Registered Others:	4 (0.25%)
Democrats:	1,046 (65.25%)

Republican:	416 (25.95%)
Unaffiliated:	141 (8.80%)
Senatorial Race, Dem. 1990:	509 (54.85%)
Senatorial Race, Rep. 1990:	419 (45.15%)
Lt. Gov., Dem. 1988:	572 (53.86%)
Lt. Gov., Rep. 1988:	490 (46.14%)
Ct. of Appeals, Dem. 1988:	547 (55.87%)
Ct. of Appeals, Rep. 1988:	432 (44.13%)

Population of Charlotte Pct. 10*(0110)

McGee Ex G

Mecklenburg County (119)
Charlotte Pct. 10*(0110)

Area:	0.5663 sq.mi.
Perimeter:	3.5300 mi.
Assigned to:	9
Units number:	69737
Total Pop.:	2,248 (100%)
White Pop.:	2,006 (89.23%)
Black Pop.:	155 (6.90%)
Am. Indian Pop.:	48 (2.14%)
Asian Pop.:	17 (0.76%)
Other Population:	22 (0.98%)
Hispanic Pop.:	33 (1.41%)
Total Voting Age Pop.:	1,808 (80.43%)
White Voting Age Pop.	1,647 (91.10%)
Black Voting Age Pop:	98 (5.42%)
Am. Indian Voting Age Pop.:	34 (1.88%)
Asian Voting Age Pop.:	11 (0.61%)
Other Voting Age Pop.:	18 (1.00%)
Hispanic Voting Age Pop.:	29 (1.60%)
Total Registered Voters:	1,483 (65.97%)
Registered Whites:	1,409 (95.01%)
Registered Blacks:	64 (4.32%)
Registered Others:	10 (0.67%)
Democrats:	941 (63.45%)

Republican:	407 (27.44%)
Unaffiliated:	135 (9.10%)
Senatorial Race, Dem. 1990:	714 (73.01%)
Senatorial Race, Rep. 1990:	264 (26.99%)
Lt. Gov., Dem. 1988:	574 (62.66%)
Lt. Gov., Rep. 1988:	342 (37.34%)
Ct. of Appeals, Dem. 1988:	410 (55.78%)
Ct. of Appeals, Rep.1988:	325 (44.22%)

Population of Charlotte Pct. 21*(0121)

McGee Ex H

Mecklenburg County (119)
Charlotte Pct. 21 * (0121)

Area:	0.7523 sq.mi.
Perimeter:	3.9950 mi.
Assigned to:	9
Units number:	69591
Total Pop.:	3,139 (100%)
White Pop.:	2,683 (85.47%)
Black Pop.:	330 (10.51%)
Am. Indian Pop.:	25 (0.80%)
Asian Pop.:	68 (2.17%)
Other Population:	33 (1.05%)
Hispanic Pop.:	83 (2.64%)
Total Voting Age Pop.:	2,577 (82.10%)
White Voting Age Pop.:	2,282 (88.55%)
Black Voting Age Pop:	202 (7.84%)
Am. Indian Voting Age Pop.:	18 (0.70%)
Asian Voting Age Pop.:	51 (1.98%)
Other Voting Age Pop.:	24 (0.93%)
Hispanic Voting Age Pop.:	54 (2.10%)
Total Registered Voters:	1,793 (57.12%)
Registered Whites:	1,667 (92.97%)
Registered Blacks:	118 (6.58%)
Registered others:	8 (0.45%)
Democrats:	1,066 (59.45%)

Republican:	612 (34.13%)
Unaffiliated:	115 (6.41%)
Senatorial Race, Dem. 1990:	663 (60.11%)
Senatorial Race, Rep. 1990:	440 (39.89%)
Lt. Gov., Dem. 1988:	553 (52.32%)
Lt. Gov., Rep. 1988:	504 (47.68%)
Ct. of Appeals, Dem.1988:	425 (48.30%)
Ct. of Appeals, Rep.1988:	455 (51.70%)

Population of Charlotte Pct. 38*(0138)

McGee Ex I

Mecklenburg County (119)	
Charlotte Pct. 38 * (0138)	
Area:	0.7095 sq.mi.
Perimeter:	3.8506 mi.
Assigned to:	9
Units number:	69605
Total Pop.:	3,457 (100%)
White Pop.:	2,936 (84.93%)
Black Pop.:	397 (11.48%)
Am. Indian Pop.:	18 (0. 52%)
Asian Pop.:	71 (2.05%)
Other Population:	35 (1.01%)
Hispanic Pop.:	90 (2.60%)
Total Voting Age Pop.:	2,974 (86.03%)
White Voting Age Pop.:	2,576 (86.62%)
Black Voting Age Pop:	299 (10.05%)
Am. Indian Voting Age Pop.:	14 (0.47%)
Asian Voting Age Pop.:	57 (1.92%)
Other Voting Age Pop.:	28 (0.94%)
Hispanic Voting Age Pop.:	75 (2.52%)
Total Registered Voters:	2,086 (60.34%)
Registered Whites:	1,895 (90.84%)
Registered Blacks:	176 (8.44%)
Registered Others:	15 (0.72%)
Democrats:	1,081 (51.82%)

Republican:	822 (39.41%)
Unaffiliated:	183 (8.77%)
Senatorial Race, Dem. 1990:	634 (54.33%)
Senatorial Race, Rep. 1990:	533 (45.67%)
Lt. Gov., Dem. 1988:	534 (44.95%)
Lt. Gov., Rep. 1988:	654 (55.05%)
Ct. of Appeals, Dem. 1988:	410 (40.67%)
Ct. of Appeals, Rep.1988:	598 (59.33%)

Population of Charlotte Pct. 77 * (0177)

McGee Ex J

Mecklenburg County (119)
Charlotte Pct. 77 * (0177)

Area:	4.4853 sq.mi.
Perimeter:	15.6393 mi.
Assigned to:	Split
Units number:	69375
Total Pop.:	3,461 (100%)
White Pop.:	440 (12.71%)
Black Pop.:	2,987 (86.30%)
Am. Indian Pop.:	6 (0.17%)
Asian Pop.:	21 (0.61%)
Other Population:	7 (0.20%)
Hispanic Pop.:	17 (0.49%)
Total Voting Age Pop.:	2,309 (66.71%)
White Voting Age Pop.:	351 (15.20%)
Black Voting Age Pop:	1,928 (83.50%)
Am. Indian Voting Age Pop.:	5 (0.22%)
Asian Voting Age Pop.:	19 (0.82%)
Other Voting Age Pop.:	6 (0.26%)
Hispanic Voting Age Pop.:	13 (0.56%)
Total Registered Voters:	1,586 (45.82%)
Registered Whites:	227 (14.31%)
Registered Blacks:	1,355 (85.44%)
Registered Others:	4 (0.25%)
Democrats:	1,370 (86.38%)

Republican:	157 (9.90%)
Unaffiliated:	59 (3.72%)
Senatorial Race, Dem. 1990:	997 (94.06%)
Senatorial Race, Rep. 1990:	63 (5.94%)
Lt. Gov., Dem. 1988:	515 (70.36%)
Lt. Gov., Rep. 1988:	217 (29.64%)
Ct. of Appeals, Dem. 1988:	446 (69.36%)
Ct. of Appeals, Rep.1988:	197 (30.64%)

North Carolina Voter Precincts Split by 97 Congressional Districts

McGee Ex K

VTE Key	County	Precinct	District	Total Pop	Black Pop	Percent Black
37.049.0809	Craven	Rhems*	3	23	23	100.0%
37.049.0809	Craven	Rhems*	1	571	308	53.9%
37.119.0177	Mecklenburg	Charlotte Pct. 77*	12	3,460	2,987	86.3%
37.119.0177	Mecklenburg	Charlotte Pct. 77*	9	1	0	0.0%

*Generated by the North Carolina General Assembly, Information Systems Division. All information is based on that in the General Assembly's apportionment system. Provided by Dan Frey, GIS Analyst.

[This page intentionally left blank]

Places Split by 97 NC Congressional Districts*

McGee Ex L

Place CE	Name	District	Total Pop	Black Pop	Percent Black
0140	Ayden town	3	150	0	0.0%
0140	Ayden town	1	4,590	2,404	52.4%
0195	Battleboro town	1	280	181	64.6%
0195	Battleboro town	2	167	11	6.6%
0390	Burlington city	5	36,339	8,759	24.1%
0390	Burlington city	6	3,159	150	4.7%

*Generated by the North Carolina Assembly, Information Systems Division. All information is based on that in the General Assembly's apportionment system. Provided by Dan Frey, GIS Analyst.

Place CE	Name	District	Total Pop	Black Pop	Percent Black
0480	Charlotte city	9	213,515	17,343	8.1%
0480	Charlotte city	12	182,419	108,484	59.5%
0535	Clinton city	7	891	171	19.2%
0535	Clinton city	2	7,313	3,289	45.0%
0600	Cornelius town	9	308	4	1.3%
0600	Cornelius town	12	2,273	521	22.9%
0660	Davidson town	10	0	0	
0660	Davidson town	12	4,046	639	15.8%
0815	Elkin town	5	3,720	347	9.3%

*Generated by the North Carolina Assembly, Information Systems Division. All information is based on that in the General Assembly's apportionment system. Provided by Dan Frey, GIS Analyst.

Place CE	Name	District	Total Pop	Black Pop	Percent Black
0815	Elkin town	10	70	8	11.4%
0910	Fayetteville city	7	44,988	10,709	23.8%
0910	Fayetteville city	8	30,707	18,270	59.5%
0960	Fremont town	3	72	62	86.1%
0960	Fremont town	1	1,638	854	52.1%
0975	Garner town	4	11,959	1,857	15.5%
0975	Garner town	2	3,008	776	25.8%
1010	Gibsonville town	5	1,480	148	10.0%

*Generated by the North Carolina Assembly, Information Systems Division. All information is based on that in the General Assembly's apportionment system. Provided by Dan Frey, GIS Analyst.

Place CE	Name	District	Total Pop	Black Pop	Percent Black
1010	Gibsonville town	6	1,961	478	24.4%
1035	Goldsboro city	1	25,734	15,901	61.8%
1035	Goldsboro city	3	14,975	3,413	22.8%
1045	Graham city	5	7,234	1,377	19.0%
1045	Graham city	6	3,192	296	9.3%
1065	Greensboro city	12	95,080	52,844	55.6%
1065	Greensboro city	6	88,441	9,460	10.7%
1070	Greenville city	1	19,249	13,197	68.6%

*Generated by the North Carolina Assembly, Information Systems Division. All information is based on that in the General Assembly's apportionment system. Provided by Dan Frey, GIS Analyst.

Place CE	Name	District	Total Pop	Black Pop	Percent Black
1070	Greenville city	3	25,723	2,140	8.3%
1195	High Point city	5	6	0	0.0%
1195	High Point city	6	37,200	4,367	11.7%
1195	High Point city	12	32,290	16,613	51.4%
1320	Kannapolis city	6	8,476	1,327	15.7%
1320	Kannapolis city	8	21,220	4,015	18.9%
1340	Kernersville town	5	10,836	606	5.6%
1340	Kernersville town	6	0	0	

*Generated by the North Carolina Assembly, Information Systems Division. All information is based on that in the General Assembly's apportionment system. Provided by Dan Frey, GIS Analyst.

Place CE	Name	District	Total Pop	Black Pop	Percent Black
1355	Kinston city	3	8,967	1,255	14.0%
1355	Kinston city	1	16,328	13,360	81.8%
1450	Lexington city	6	2,885	363	12.6%
1450	Lexington city	12	13,696	4,553	33.2%
1640	Mebane city	4	485	65	13.4%
1640	Mebane city	5	4,269	887	20.8%
1700	Mooresville town	10	0	0	
1700	Mooresville town	12	8,818	2,131	24.2%

*Generated by the North Carolina Assembly, Information Systems Division. All information is based on that in the General Assembly's apportionment system. Provided by Dan Frey, GIS Analyst.

Place CE	Name	District	Total Pop	Black Pop	Percent Black
1745	Mount Olive town	3	4,581	2,404	52.5%
1745	Mount Olive town	7	1	1	100.0%
1770	New Bern city	3	3,442	843	24.5%
1770	New Bern city	1	13,921	6,720	48.3%
2020	Raleigh city	2	107,979	47,131	43.6%
2020	Raleigh city	4	99,973	10,229	10.2%
2040	Red Springs town	7	58	0	0.0%

*Generated by the North Carolina Assembly, Information Systems Division. All information is based on that in the General Assembly's apportionment system. Provided by Dan Frey, GIS Analyst.

Place CE	Name	District	Total Pop	Black Pop	Percent Black
2040	Red Springs town	8	3,736	1,965	52.6%
2115	Rocky Mount city	1	17,057	14,473	84.9%
2115	Rocy Mount city	2	31,940	9,824	30.8%
2195	Salisbury city	6	5,250	808	15.4%
2195	Salisbury city	12	17,837	7,316	41.0%
2260	Sharpsburg town	1	482	391	81.1%

*Generated by the North Carolina Assembly, Information Systems Division. All information is based on that in the General Assembly's apportionment system. Provided by Dan Frey, GIS Analyst.

Place CE	Name	District	Total Pop	Black Pop	Percent Black
2260	Sharpsburg town	2	1,054	193	18.3%
2370	Spencer town	6	8	2	25.0%
2370	Spencer town	12	3,211	723	22.5%
2430	Statesville city	10	12,324	2,327	18.9%
2430	Statesville city	12	5,243	3,953	75.4%
2467	Surf City town	3	317	3	0.9%
2467	Surf City town	7	653	1	0.2%
2510	Thomasville city	6	6,909	660	9.6%

*Generated by the North Carolina Assembly, Information Systems Division. All information is based on that in the General Assembly's apportionment system. Provided by Dan Frey, GIS Analyst.

Place CE	Name	District	Total Pop	Black Pop	Percent Black
2510	Thomasville city	12	9,006	3,760	41.7%
2535	Trent Woods town	1	299	0	0.0%
2535	Trent Woods town	3	2,067	0	0.0%
2545	Troutman town	10	1,419	395	27.8%
2545	Troutman town	12	74	0	0.0%
2655	Washington city	3	2	0	0.0%

*Generated by the North Carolina Assembly, Information Systems Division. All information is based on that in the General Assembly's apportionment system. Provided by Dan Frey, GIS Analyst.

Place CE	Name	District	Total Pop	Black Pop	Percent Black
2655	Washington city	1	9,073	4,158	45.8%
2687	Weddington town	8	3,803	108	2.8%
2687	Weddington town	9	0	0	
2725	Whitakers town	1	464	281	60.6%
2725	Whitakers town	2	396	163	41.2%
2760	Wilson city	1	26,127	16,772	64.2%
2760	Wilson city	2	10,803	554	5.1%

*Generated by the North Carolina Assembly, Information Systems Division. All information is based on that in the General Assembly's apportionment system. Provided by Dan Frey, GIS Analyst.

Place CE	Name	District	Total Pop	Black Pop	Percent Black
2785	Winston-Salem city	12	54,270	41,998	77.4%
2785	Winston-Salem city	5	89,215	14,330	16.1%

•Generated by the North Carolina Assembly, Information Systems Division. All information is based on that in the General Assembly's apportionment system. Provided by Dan Frey, GIS Analyst.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
Raleigh Division
Civil Action No. 4:96-CV-104-BO(3)

MARTIN CROMARTIE, *et al.*, Plaintiffs,

vs.

JAMES B. HUNT, JR., in his official capacity as Governor of the State of North Carolina, *et al.*, Defendants.

CONDITIONAL MOTION TO STRIKE THE AFFIDAVITS OF ROY COOPER, III AND EDWIN McMAHAN

Plaintiffs respectfully show that Defendants have moved to strike the affidavit of John Weatherly submitted by Plaintiffs. In support thereof, Defendants have contended that his statements as a legislator, with respect to the intent of a statute, are inadmissible under North Carolina law. In support of that contention they have cited several precedents. Plaintiffs submit that, if accepted, the same argument would render inadmissible the affidavits offered by Senator Cooper and Representative McMahan;

CONDITIONAL MOTION TO STRIKE, CONTINUED . . .

WHEREFORE, Plaintiffs move that, in the event that the Court decides to grant Defendants' motion to strike Weatherly's affidavit, the Court also strike the affidavits of Cooper and McMahan.

Respectfully submitted, this the 23rd day of March, 1998.

/s/ Robinson O. Everett
Everett & Everett
N.C. State Bar No.: 1385
As Attorney for the Plaintiffs
P.O. Box 586
Durham, NC 27702
Telephone: (919)-682-5691

Williams, Boger, Grady, Davis
& Tittle, P.A.

/s/ by: Martin B. McGee
State Bar No.: 22198
Attorneys for the Plaintiffs
P.O. Box 810
Concord, NC 28026-0810
Telephone: (704)-782-1173

ANSWER OF DEFENDANT-INTERVENOR

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
RALEIGH DIVISION
Civil Action No. 4:96-CV-104

MARTIN CROMARTIE, *et al.*)
Plaintiffs,)
)
v.)
)
JAMES B. HUNT, JR., *et al.*,)
Defendants,)
)
and)
)
ALFRED SMALLWOOD, *et al.*,)
Applicant Defendant-Intervenors.)

AMENDED ANSWER OF DEFENDANT INTERVENORS

Defendant intervenors Alfred Smallwood, David Moore, William M. Hodges, Robert L. Davis, Jr., Jan Valder, Barney Offerman, Virginia Newell, Charles Lambeth and George Simkins answer the titled and numbered allegations of the Complaint as follows:

Preliminary Statement

Plaintiffs' preliminary statement is a summary description of the nature of their claims and need not be admitted or denied. To the extent an answer is required, the allegations are denied.

The Parties

1. Defendant intervenors do not have sufficient information upon which to form belief about the accuracy of the allegations of Paragraph 1. Those allegations are therefore denied.

2. It is admitted that James B. Hunt, Jr. is the Go rnor of the State of North Carolina, sued in his official capacity, and that pursuant to Article III of the constitution of North Carolina the executive power of the State is vested in the Governor and it is his duty to take care that the laws are faithfully executed. It is further admitted that pursuant to N.C. Gen. Stat. § 163-194, the Governor shall issue a commission attesting to person's election as a member of the United States House of Representatives upon the person's production of a certificate of his or her election from the Secretary of State. Any remaining allegations in Paragraph 2 are denied.

3. It is admitted that Dennis Wicker is the Lieutenant Governor of the State of North Carolina, sued in his

official capacity, and that pursuant to Articles II and III of the Constitution of North Carolina, he is President of the Senate and performs such additional duties, including signing enacted legislation, as the General Assembly or the Governor may assign to him. Any remaining allegations in Paragraph 3 are denied.

4. It is admitted that Harold Brubaker is the Speaker of the North Carolina House of Representatives, sued in his official capacity, and performs duties, including signing enacted legislation, assigned to him by the House of Representatives. Any remaining allegations of Paragraph 4 are denied.

5. Paragraph 5 is admitted.

6. Paragraph 6 is admitted.

Jurisdiction and Venue

7. It is admitted that plaintiffs rely upon the constitutional and statutory provisions cited in Paragraph 7. Any remaining allegations are denied.

8. The allegations of Paragraph 8 are admitted.

9. It is admitted that venue exists in the Eastern District of North Carolina. The remaining allegations in Paragraph 9 are denied.

Three-Judge District Court

10. It is admitted that the convocation of a three-judge district court is required to adjudicate this action as required by 28 U.S.C. § 2284. The remaining allegations in Paragraph 10 are denied.

History of the Case

11. Paragraph 11 is admitted upon information and belief.

12. Paragraph 12 is admitted.

13. It is admitted that North Carolina became entitled to twelve representatives in Congress as a result of the 1990 Census, and that the General Assembly undertook to prepare a redistricting plan that would contain twelve districts. The allegations in Paragraph 13 are denied.

14. It is admitted on July 9, 1991, the General Assembly enacted a congressional redistricting plan which included one majority African American district. All remaining allegations of Paragraph 14 are denied.

15. It is admitted that the Civil Rights Division of the Department of Justice denied preclearance of the 1991 plan under Section 5 of the Voting Rights Act. The remaining allegations in Paragraph 15 are denied.

16. It is admitted that on January 24, 1992, the General Assembly enacted a second congressional redistricting plan which included two majority African American districts. All remaining allegations of Paragraph 16 are denied.

17. Paragraph 17 is admitted.

18. Paragraph 18 is a legal contention which does not require an answer.

19. The allegations of Paragraph 19 constitute legal contentions. To the extent an answer is required, the courts' opinions speak for themselves and any remaining allegations are denied.

20. Paragraph 20 is admitted.

21. It is admitted that subsequent proceedings were stayed in this action pending the outcome of the proceedings in the *Shaw* litigation, including possible legislative action by the General Assembly to enact a new congressional redistricting plan to cure the constitutional defect held to exist in the 1992 plan. Any remaining allegations of Paragraph 21 are denied.

ANSWER OF DEFENDANT-INTERVENOR, CONTINUED . . .

22. Paragraph 22 is admitted.

23. It is admitted that as a result of the general elections conducted in November, 1996 under the redistricting plan which in June, 1996 the Supreme Court had ruled unconstitutional, six Democrats and six Republicans were elected to Congress and continue to serve there at the present time. It is admitted that Melvin Watt, and Eva Clayton are African American, registered Democrats, and members of Congress. The remaining allegations in Paragraph 23 are denied.

24. Paragraph 24 is denied.

25. Paragraph 25 is denied.

26. Paragraph 26 is denied.

27. Paragraph 27 is denied.

28. Paragraph 28 is denied.

29. Paragraph 29 is denied.

ANSWER OF DEFENDANT-INTERVENOR, CONTINUED . . .

Claim for Relief

30. Defendant intervenors incorporate and reallege their responses to prior allegations.

31. Paragraph 31 is denied.

32. Paragraph 32 is denied.

33. Paragraph 33 is denied.

34. Paragraph 34 is denied.

35. Paragraph 35 is denied.

36. Paragraph 36 is denied.

FIRST DEFENSE

Plaintiffs Cromartie and Muse are barred from bringing this action by the doctrines of res judicata and collateral estoppel.

SECOND DEFENSE

The 1997 Remedy Plan is not a racial gerrymander.

THIRD DEFENSE

Racial considerations did not predominate, and traditional districting principles were not subordinated in the construction or design of the 1997 Remedy Plan or in any of the districts in the Plan.

FOURTH DEFENSE

The State had a compelling interest in creating a majority African American district in the area of the State covered by the First District in order to comply with Section 2 of the Voting Rights Act, as amended, 42 U.S.C. § 1973. The African American population in that area of the State is sufficiently large and geographically compact to afford the opportunity of creating a majority African American district and is politically cohesive. The white population in that area votes sufficiently as a bloc to enable it usually to defeat the African American population's preferred candidate when elections are conducted in political units with a majority of white voting age residents. The 1st congressional district is narrowly tailored to serve that compelling interest.

FIFTH DEFENSE

The State had a compelling interest in creating a majority African American district in the area of the State covered by the First District in order to comply with Section 5

of the Voting Rights Act, as amended, 42 U.S.C. § 1973c, and that district is narrowly tailored to serve that interest.

SIXTH DEFENSE

A majority African American district is required in the area of the State covered by the First District in order to remedy past discrimination against African American voters in congressional redistricting, voter registration, political participation, and elections.

WHEREFORE, defendant intervenors respectfully pray that:

1. This action be dismissed;

2. Plaintiffs be taxed with the cost of this action; and

3. Defendant intervenors have such other and further relief as the Court deems just and proper.

This 22nd day of May, 1998.

Respectfully submitted,

/s/ Adam Stein
ADAM STEIN
Ferguson, Stein, Wallas, Adkins
Gresham & Sumter, P.A.
312 West Franklin Street
Chapel Hill, North Carolina 27516
(919) 933-5300

ELAINE R. JONES
Director-Counsel
NORMAN J. CHACHKIN
JACQUELINE A. BERRIEN
NAACP Legal Defense
& Educational Fund, Inc.
99 Hudson Street, Suite 1600
New York, New York 10013
(212) 219-1900

TODD A. COX
NAACP Legal Defense
& Educational Fund, Inc.
1275 K Street, N.W., Suite 301
Washington, D.C. 20005
(202) 682-1300

Counsel for Applicants

[Certificate of Service omitted in printing]

(4)

No. 98-85

FILED
NOV 10 1998
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

OCTOBER TERM 1998

JAMES B. HUNT, JR., *et al.*,

Appellants,

and

ALFRED SMALLWOOD, *et al.*,

Appellant-Intervenors,

v.

MARTIN CROMARTIE, *et al.*,

Appellees.

On Appeal from the United States District Court
Eastern District of North Carolina

BRIEF OF APPELLANT-INTERVENORS

ELAINE R. JONES
Director-Counsel
THEODORE M. SHAW
NORMAN J. CHACHKIN
JACQUELINE A. BERRIEN
VICTOR A. BOLDEN
DEBORAH N. ARCHER
NAACP LEGAL DEFENSE
& EDUCATIONAL FUND, INC.
99 Hudson Street, Suite 1600
New York, New York 10013
(212) 219-1900

ADAM STEIN
FERGUSON, STEIN, WALLAS,
ADKINS GRESHAM &
SUMTER, P.A.
312 West Franklin Street
Chapel Hill, NC 27516
(919) 933-5300

TODD A. COX*
NAACP LEGAL DEFENSE
& EDUCATIONAL FUND, INC.
1444 Eye Street, NW
10th Floor
Washington, DC 20005
(202) 682-1300

**Counsel of Record*

Attorneys for Appellant-Intervenors

54pp

QUESTIONS PRESENTED

1. In a racial gerrymandering case, is an inference drawn from the challenged district's shape and racial demographics, standing alone, sufficient to support summary judgment for the plaintiffs on the contested issue of the predominance of racial motives in the district's design, when it is directly contradicted by the affidavits of the legislators who drew the district?

2. Does a final judgment from a court of competent jurisdiction, which finds a state's proposed congressional redistricting plan does not violate the constitutional rights of the named plaintiffs and authorizes the state to proceed with elections under it, preclude a later constitutional challenge to the same plan in a separate action brought by those plaintiffs and their privies?

3. Is a state congressional district subject to strict scrutiny under the Equal Protection Clause simply because it is slightly irregular in shape and contains a higher concentration of minority voters than its neighbors, when it is not a majority-minority district, it complies with all of the race neutral districting criteria the state purported to be following in designing the plan, and there is not *direct* evidence that race was the predominant factor in its design?

PARTIES TO THE PROCEEDINGS

Actual parties to the proceeding in the United States District Court were:

(1) James B. Hunt, Jr., in his capacity as Governor of the State of North Carolina, Dennis Wicker in his official capacity as Lieutenant Governor of the State of North Carolina, Harold Brubaker in his official capacity as Speaker of the North Carolina House of Representatives, Elaine Marshall in her official capacity as Secretary of the State of North Carolina, and Larry Leake, S. Katherine Burnette, Faiger Blackwell, Dorothy Presser and June Youngblood in their capacity as the North Carolina State Board of Elections, defendants, appellants herein,

(2) Alfred Smallwood, David Moore, William M. Hodges, Robert L. Davis, Jr., Jan Valder, Barney Offerman, Virginia Newell, Charles Lambeth and George Simkins, defendant-intervenors, appellant-intervenors herein,

(3) Martin Cromartie, Thomas Chandler Muse, R.O. Everett, J.H. Froelich, James Ronald Linville, Susan Hardaway, Robert Weaver and Joel K. Bourne, plaintiffs, appellees herein.

TABLE OF CONTENTS

Page

Questions Presented i

Parties to the Proceedings ii

Table of Authorities vi

Opinions Below 1

Jurisdiction 1

Constitutional and Statutory Provisions Involved 2

Statement of the Case 2

A. Events leading to Adoption of the 1997 Remedial Plan 2

B. The 1997 Remedial Plan 6

C. The Legal Challenge to the 1997 Remedial Plan 10

Summary of Argument 15

ARGUMENT –

I. Summary Judgment was Inappropriate in this Case 17

TABLE OF CONTENTS (continued)

Page

ARGUMENT (continued)

A. Because this case involves an inquiry into the intent of the North Carolina legislature, it should not have been resolved through summary judgment 17

B. Because this case necessarily concerns issues arising under the Voting Rights Act, it should not have been resolved through summary judgment 23

II The District Court Erred in Ruling That Race Was the Predominant Factor in the Creation of the Twelfth Congressional District 27

A. The court erred in sanctioning the Appellees' argument that race predominated in the development of the 1997 Remedial Plan because that plan did not evidence legislature's complete abandonment of the 1992 plan as a starting point for fashioning the remedy 27

TABLE OF CONTENTS (continued)

Page

ARGUMENT (continued)

B. In jurisdictions such as North Carolina, with a history of prior discrimination and minority vote dilution, and in which voting patterns remain racially polarized, districting must be sufficiently race-conscious to avoid violating Section 2 of the Voting Rights Act, but that circumstance does not establish that race "predominates" so as to trigger "strict scrutiny" 32

III Even if Race Predominated in its Creation, the District Court Erred in Never Determining if the State had a Compelling Justification for Creating a Narrowly Tailored District 12 40

Conclusion 42

TABLE OF AUTHORITIES

CASES

Page

Abrams v. Johnson,
521 U.S. 74 (1997) 36

Anderson v. Liberty Lobby, Inc.,
477 U.S. 242 (1986) 18

Bronze Shields, Inc. v. New Jersey Department of Civil Service, 667 F.2d 1074 (3d Cir. 1981), *cert. denied*, 458 U.S. 1152 (1982) 18

Burns v. Richardson,
384 U.S. 73 (1966) 29

Bush v. Vera,
517 U.S. 952 (1996) ..... *passim*

City of Rome v. United States,
450 F. Supp. 378 (D.D.C. 1978) 26

Clark v. Calhoun County,
88 F. 3d. 1393 (5th Cir. 1996) 38

County Council v. United States,
555 F. Supp.694 (D.D.C. 1983) 26

CASES (continued)

Page

DeWitt v. Wilson,
856 F. Supp. 1409 (E.D. Cal. 1994),
aff'd, 515 U.S. 1170 (1995) 37

Gingles v. Edmisten,
590 F. Supp. 345 (E.D.N.C. 1984),
aff'd in part and rev'd in part, sub. nom.,
Thornburg v. Gingles, 478 U.S. 30 (1986) .. *passim*

Growe v. Emison,
507 U.S. 25 (1993) 29

Jeffers v. Clinton,
839 F. Supp. 612 (E.D. Ark. 1993) 23

Johnson v. DeSoto County Board of Commissioners,
868 F. Supp. 1376 (M.D. Fla. 1994) 24

Johnson v. Miller,
864 F. Supp. 1354 (S.D. Ga. 1994),
aff'd, 515 U.S. 900 (1995) 19, 20

King v. State Board of Elections,
___ U.S. ___, 118 S. Ct. 877 (1998) 36

Lawyer v. Department of Justice,
521 U.S. 567 (1997) ..... *passim*

Lipsett v. University of Puerto Rico,
864 F.2d 881 (1st Cir. 1988) 18

CASES (continued)

Page

Mallory v. Eyrich,
707 F. Supp. 947 (S.D. Ohio 1994) 24

McDaniel v. Sanchez,
452 U.S. 130 (1981) 30

McGhee v. Granville County,
860 F.2d 110 (4th Cir. 1988) 29

Miller v. Johnson,
515 U.S. 900 (1995) ..... *passim*

Poller v. Columbia Broadcasting System, Inc.,
368 U.S. 464 (1962) 18

Pullman-Standard v. Swint,
456 U.S. 273 (1982) 18

Ross v. Communications Satellite Corp.,
759 F.2d 355 (4th Cir. 1985) 19

Scott v. United States,
920 F. Supp. 1248 (M.D. Fla. 1996),
aff'd sub. nom., Lawyer v. Department of Justice, 521 U.S. 567 (1997) 38

Shaw v. Hunt,
517 U.S. 899 (1996) ..... *passim*

CASES (continued)

Page

Shaw v. Hunt,
No. 92-202-CIV-5-BR (E.D.N.C. September 12, 1997) 9

Shaw v. Hunt,
861 F. Supp. 408 (E.D.N.C. 1994),
rev'd, 517 U.S. 899 (1996) 1

Shaw v. Reno,
509 U.S. 630 (1993) ..... *passim*

Shaw v. Reno,
808 F. Supp. 461 (E.D.N.C. 1992) 1

Smith v. Beasley,
946 F. Supp. 1174 (D.S.C. 1996) 21, 25

Smith v. University of North Carolina,
632 F.2d 316 (4th Cir. 1980) 18

Stepanischen v. Merchants Despatch Transportation Corp., 722 F.2d 922 (1st Cir. 1983) 18

Tallahassee Branch of NAACP v. Leon County,
827 F.2d 1436 (11th Cir. 1987) 29

Thornburg v. Gingles,
478 U.S. 30 (1986) 23, 37

CASES (continued)

Page

United States v. Hayes,
515 U.S. 737 (1995) 33

Upham v. Seamon,
456 U.S. 37 (1982) 30

Vera v. Richards,
861 F. Supp. 1304 (S.D. Tex. 1994),
aff'd sub. nom., Bush v. Vera,
517 U.S. 952 (1996) ..... *passim*

Voinovich v. Quilter,
507 U.S. 146 (1993) 29

White v. Weiser,
412 U.S. 783 (1973) 29, 30

Wilson v. Eu,
1 Cal. 4th 707, 823 P.2d 545,
4 Cal. Rptr.2d 379 (1992) 37

Wise v. Lipscomb,
437 U.S. 535 (1978) 29

STATUTES & RULES

28 U.S.C. § 1253 2

42 U.S.C. § 1973 ..... 23, 32

STATUTES & RULES (continued)

Page

42 U.S.C. § 1973c 9

1997 N.C. Sess. Laws, Ch. 11 1

Fed. R. Civ. P. 56 2

OTHER AUTHORITIES

10B Charles A. Wright, Arthur R. Miller, &
Mary K. Kane, Federal Practice
and Procedure (1998 ed.) 19

BRIEF OF APPELLANT-INTERVENORS

Alfred Smallwood, David Moore, William M. Hodges, Robert L. Davis, Jr., Jan Valder, Barney Offerman, Virginia Newell, Charles Lambeth and George Simkins ("Smallwood Appellants"), white and African-American citizens and registered voters residing in either North Carolina's First or Twelfth Congressional District, were granted leave by this Court to intervene as Appellants from the final judgment of the three-judge United States District Court for the Eastern District of North Carolina, entered April 6, 1998, in *Cromartie v. Hunt*. The *Cromartie* three-judge court held that the Twelfth Congressional District of North Carolina's 1997 congressional reapportionment plan, 1997 N.C. Sess. Laws., Ch. 11 ("1997 Remedial Plan"), violates the Fourteenth Amendment to the United States Constitution.

OPINIONS BELOW

The April 14, 1998 opinion of the three-judge district court appears in the Appendix to the Jurisdictional Statement on Behalf of the State of North Carolina ("NC. J.S. App.") at 1a. The district court's order and permanent injunction, entered on April 3, 1998, and the district court's final judgment, entered April 6, 1998, are unreported and appear at NC. J.S. App. at 45a and NC. J.S. App. at 49a, respectively. Previous decisions of earlier phases of related litigation are reported at *Shaw v. Hunt*, 517 U.S. 899 (1996); *Shaw v. Reno*, 509 U.S. 630 (1993); *Shaw v. Hunt*, 861 F. Supp. 408 (E.D.N.C. 1994); and *Shaw v. Reno*, 808 F. Supp. 461 (E.D.N.C. 1992).

JURISDICTION

The judgment of the court below was entered on April 6, 1998. The State of North Carolina filed an amended notice of appeal to this Court on April 8, 1998. This Court noted probable jurisdiction on September 29, 1998. The jurisdiction

of this Court is invoked under 28 U.S.C. § 1253.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This appeal involves the Equal Protection Clause of the Fourteenth Amendment and Rule 56 of the Federal Rules of Civil Procedure, reproduced at NC. J.S. App. at 169a and 171a, respectively.

STATEMENT OF THE CASE

A. Events leading to Adoption of the 1997 Remedial Plan

This case is a challenge to the 1997 Remedial Plan, which is the third congressional redistricting plan enacted by the North Carolina General Assembly since the 1990 Census.[1]

On remand, the North Carolina General Assembly convened to develop a redistricting plan to remedy the constitutional infirmities found by this Court. While the State has identified many factors, especially political concerns, that were considered by the General Assembly, the legislature also had before it an extensive record concerning the historical exclusion of black voters, continuing racial appeals in North Carolina election contests, the socio-economic disparities affecting African-American voters' opportunities to participate in the political process, the lack of success of African-American

[1]This Court's ruling in *Shaw v. Hunt*, 517 U.S. 899 (1996), concerned the 1992 Congressional Redistricting Plan ("1992 Plan") enacted by the North Carolina legislature following the 1990 Census. In *Shaw*, this Court held that the 1992 Plan was unconstitutional because the location and configuration of District 12 violated the equal protection rights of some of the plaintiffs in the action. *Shaw*, 517 U.S. at 902. A map of the 1992 Plan is reproduced at NC. J.S. App. at 61a.

candidates, and the continuing prevalence of racially polarized voting. *See, e.g.*, Affidavit of Gary O. Bartlett, Section 5 Submission, Attachment 97C-28F-3B, North Carolina Congressional Redistricting Public Hearing Transcript, February 26, 1997 at 19-22; *Id.*, Ex. 6 (Statement of Anita Hodgkiss) at 2-7; *Id.*, Ex. 6, Tab 2 (Expert Report of Dr. Richard Engstrom) ("Engstrom Report").

Indeed, the General Assembly was aware that for nine decades, from 1901 until 1992, no African-American candidate had been elected to Congress in North Carolina, even when they enjoyed the overwhelming support of African-American voters. Moreover, African-American voters were disenfranchised as a result of conscious, deliberate and calculated state laws that both denied African-American voters access to the ballot box and effectively diluted their votes. *See Gingles v. Edmisten*, 590 F. Supp. 345, 359 (E.D.N.C. 1984), *aff'd in part and rev'd in part sub nom. Thornburg v. Gingles*, 478 U.S. 30 (1986). The State utilized measures such as poll taxes, literacy tests, anti-single shot voting laws, and at-large and multi-member election districts to exclude African-Americans from the political process. *Id. See also* Affidavit of Gary O. Bartlett, Section 5 Submission, Attachment 97C-28F-3B, North Carolina Congressional Redistricting Public Hearing Transcript, February 26, 1997 at 19-22; *Id.*, Ex. 6, Tab 17 (Expert Report of Dr. J. Morgan Kousser) ("Kousser Report"); Affidavit of Dr. David R. Goldfield ("Goldfield Report"), filed as Tab 3 to Defendants' Brief in Opposition to Plaintiffs' Motion for Summary Judgment and in Support of Their Cross-Motion for Summary Judgment. Specifically, with regard to congressional districting, in its 1970 and 1980 reapportionment plans, the General Assembly intentionally fragmented the African-American vote in the

northeastern portion of the state to make sure African-American voters could not garner enough support to elect their preferred candidate to Congress. Kousser Report at 34-46. Also, racial appeals in campaigns were used by white candidates to dissuade white voters from supporting African-American candidates. Affidavit of Gary O. Bartlett, Section 5 Submission, Attachment 97C-28F-3B, North Carolina Congressional Redistricting Public Hearing Transcript, February 26, 1997, Ex. 6, Tab 17 (Expert Report of Dr. Harry L. Watson).

To this day, the ability of African-American voters to participate in congressional elections has continued to be hindered by the persistent effects of past official discrimination. For example, the legacy of literacy tests, in use until the mid-1970's, and poll taxes continues to be reflected in the fact that African-American voters are registered to vote in lower percentages than white voters.[2] African-American voters as a whole are less well-educated, lower-paid, more likely to be in poverty, and have less access to basic instruments of political participation such as telephones, cars, and money than do their white counterparts, which adversely affects their ability to participate effectively in the political process. Affidavit of Gary O. Bartlett, Section 5 Submission, Attachment 97C-28F-3B, North Carolina Congressional Redistricting Public Hearing

[2]In 1960, statewide only 39.1 percent of the African-American voting- age population was registered to vote, compared to 92.1 percent of the white voting-age population. *Gingles v. Edmisten*, 590 F. Supp. at 360. In the majority-black counties, all located in eastern North Carolina, less than 20 percent of the African-American population was registered to vote in 1960. Goldfield Report at 5. By 1980, statewide 51.3 percent of age-qualified blacks and 70.1 percent of whites were registered. *Gingles*, 590 F. Supp. at 360. In 1993, 61.3 percent of blacks and 72.5 percent of whites who were eligible to vote were registered. Stipulation No. 63.

Transcript, February 26, 1997, Ex. 6, Tab 17 (*Shaw v. Hunt*, Defendant-Intervenor Stipulations) ("Stipulations") Nos. 1-58, 64-67).

Elections in North Carolina in the 1990's are still marked by direct appeals to race designed to discourage white voters from voting for African-American candidates. Affidavit of Gary O. Bartlett, Section 5 Submission, Attachment 97C-28F-3B, North Carolina Congressional Redistricting Public Hearing Transcript, February 26, 1997, Ex. 6, Tab 17 (Expert Report of Dr. Alex Willingham) at 17-26. In fact, in 1990, large numbers of qualified African-American voters were anonymously sent post cards which misrepresented state law and threatened them with criminal prosecution if they tried to vote after having recently moved. Affidavit of Gary O. Bartlett, Section 5 Submission, Attachment 97C-28F-3B, North Carolina Congressional Redistricting Public Hearing Transcript, February 26, 1997, Ex. 6, Tab 16 (*Shaw v. Hunt* Defendant-Intervenor Ex. 522-531).

In North Carolina elections, white voters tend not to support the candidates of choice of African-American voters. In this century, no African-American candidate other than Ralph Campbell, State Auditor, has ever won a statewide election contest for a non-judicial office. No single-member majority-white state legislative district has ever elected an African-American candidate to the state legislature. Stipulation Nos. 13, 18. A study of 50 recent elections in which voters have been presented with a choice between African-American and white candidates, including congressional elections, statewide elections and state legislative elections, found that 49 of the 50 were characterized by racially polarized voting. *See* Engstrom Report. In every statewide election since 1988 where voters

were presented with a biracial field of candidates, voting patterns indicated significant white-bloc voting. *Id.* In all except two low-profile contests, racially polarized voting was sufficient to defeat the candidate chosen by African-American voters. *Id.*

A pattern of racially polarized voting continued in the 1996 U.S. Senate campaign between Harvey Gantt and Jesse Helms. The regression and homogeneous precinct analyses show that statewide, Gantt received between 97.9 percent and 100 percent of the African-American vote, but only 35.7 percent to 38.1 percent of the non-African-American vote. *See* Affidavit of Gary O. Bartlett, Section 5 Submission at Attachments 97C-28F-3B and 97C-28F-D(3), p.6.

B. The 1997 Remedial Plan

The first post-1990 Census North Carolina congressional reapportionment plan, enacted in 1991, contained one majority-black district that was 55.69 percent black in total population and 52.18 percent black in voting age population.[3] The second post-1990 Census reapportionment plan, enacted in 1992, contained two majority-black districts (the First and Twelfth Congressional Districts), but the Twelfth Congressional District was held unconstitutional in *Shaw v. Hunt*.

The North Carolina General Assembly enacted the 1997 Remedial Plan to remedy the constitutional violation found in *Shaw v. Hunt*. District 12 in the 1997 Remedial Plan is no longer a majority-black district. In fact, by every measure, the African-American population in District 12 is approximately ten

[3]This Court discussed the history of the first plan in *Shaw* v. *Reno*, 509 U.S. 630 (1993) and *Shaw v. Hunt*, 517 U.S. 899 (1996).

percentage points lower than it was in the 1992 Plan:

Population	1992 Dist. 12	**1997 Dist. 12**
Total Black	56.63%	**46.67%**
Total White	41.80%	**51.59%**
Voting Age Black	53.34%	**43.36%**
Voting Age White	45.21%	**55.05%**

Jt. App. at 111 - 115.

In 1997, the General Assembly had two primary redistricting goals. The first was to remedy constitutional defects found by this Court in the 1992 Plan, including the predominance of racial considerations underlying the shape and location of District 12. NC. J.S. App. at 63a. The General Assembly accomplished this goal by utilizing a variety of different redistricting techniques (including several that were not used in 1992), *id.*, including:

1. Avoiding any division of precincts and of counties to the extent possible;

2. Avoiding use of narrow corridors to connect concentrations of minority voters;

3. Striving for geographical compactness without use of artificial devices such as double cross-overs or point contiguity;

4. Pursuing functional compactness by grouping together citizens with similar interests and needs; and

5. Seeking to create districts that provide easy communication among voters and their representatives.

The second primary goal was to preserve the even (six Republican and six Democratic members) partisan balance in North Carolina's then-existing congressional delegation, which reflected the existing balance between Democrats and Republicans in the State. *Id.* at 64a. In addition, with the State House of Representatives controlled by Republicans and the State Senate controlled by Democrats, preserving the same partisan balance in the congressional delegation was essential to ensure that the General Assembly would be able to agree on a remedial plan. Preserving the political status quo in the congressional delegation was necessary to avoid dissension from either party, *see id.*, and, therefore, an entirely new configuration would not have been politically acceptable. However, the General Assembly felt, as a matter of policy, that the legislature, rather than the *Shaw* district court, had a constitutional duty to devise a new remedial plan, conducting the necessary balancing of the various interests necessary in redistricting. *See id.*

During the 1997 redistricting process, the General Assembly considered, but ultimately rejected, proposed plans that would have created a second majority-minority district in the area east of Charlotte toward Cumberland and Robeson Counties. Several groups and individuals, including the North

Carolina Association of Black Lawyers and State Representative Mickey Michaux, objected to the 1997 Remedial Plan because, in their view, it diluted the voting strength of African-Americans in certain areas of the state and "deliberately separates large politically cohesive African-American communities." *See Shaw v. Hunt,* No. 92-202-CIV-5, Memorandum in Support of Motion to Intervene (E.D.N.C. filed April 15, 1997). The plan favored by these groups was designed to avoid dilution; it also would have combined African-American voters in Charlotte with voters, including African-American and Native American voters, in rural areas southeast of Charlotte. The General Assembly concluded that such a district would have combined urban and rural voters with disparate and divergent economic, social and cultural interests and needs. NC. J.S. App. at 66a. Also, the proposed district lacked a natural means of communication and access among its residents. In addition, that district would have thwarted the goal of maintaining partisan balance in the State's congressional delegation. *Id.* Although this plan was not enacted, the State has recognized the need to preserve an equal opportunity for African-American voters to elect their candidates of choice in District 12. *See* NC. J.S. App. at 66a.

The General Assembly enacted the 1997 Remedial Plan on March 31, 1997 and submitted it to the three-judge court in *Shaw v. Hunt,* No. 92-202-CIV-5-BR (E.D.N.C.) the following day. The State also submitted the plan for preclearance by the United States Department of Justice pursuant to Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c. On June 9, 1997, the Department of Justice precleared the plan. *See* NC. J.S. App. at 162a (*Shaw v. Hunt,* No. 92-202-CIV-5-BR, Memorandum Opinion (E.D.N.C. September 12, 1997)).

On September 12,1997, the three-judge district court in *Shaw v. Hunt* unanimously approved the 1997 Remedial Plan as "a constitutionally adequate remedy for the specific violation found by the Supreme Court in [*Shaw v. Hunt*]." NC. J.S. App. at 167a. A map of the 1997 Remedial Plan is reproduced at NC. J.S. App. at 59a.

C. The Legal Challenge to the 1997 Remedial Plan

On July 3, 1996, following the decision of this Court in *Shaw v. Hunt*, three residents of Tarboro, North Carolina, Appellees herein, filed the complaint in this action (*Cromartie v. Hunt*), challenging District 1 in North Carolina's 1992 Plan on the ground that it violated their equal protection rights because race predominated in the drawing of the district. A stay was entered pending the resolution of the remand proceedings in *Shaw v. Hunt*. On July 9, 1996 the same Tarboro residents joined the original plaintiffs in *Shaw* in filing an Amended Complaint in *Shaw*, raising a similar challenge to and asserting the same claims against the First Congressional District as they raised in *Cromartie v. Hunt*. On July 11, 1996, the members of the Smallwood Appellant group (three voters from the First District and six voters from the Twelfth District) sought to intervene in the *Cromartie* suit as defendants.[4]

The *Shaw* case was dismissed by the three-judge court on September 12, 1997, and the *Cromartie* three-judge court lifted its stay of proceedings on October 17, 1997. On the same day, two of the three original plaintiffs, along with four residents of District 12, filed an amended complaint in the

[4]The Smallwood Appellants participated fully as intervenors in *Shaw v. Hunt* in the trial court and in this Court, including in the remedial proceedings which resulted in the approval of the 1997 Remedy Plan.

Cromartie action, challenging the 1997 Remedial Plan as a violation of the Equal Protection Clause and still seeking a declaration that District 1 in the 1992 Plan is unconstitutional.[5] Within the time allowed for answering that amended complaint, the Smallwood Appellants filed a renewed motion to intervene as defendants.

On March 31, 1998, the court below heard arguments on cross-motions for summary judgment and on the *Cromartie* plaintiffs' request for preliminary injunction. At the time of this hearing, the district court had not ruled on the motions to intervene of the Smallwood Appellants which had then been pending for over twenty months and four months, respectively. The court issued its permanent injunction and granted summary judgment without ruling on these unopposed motions or holding a hearing on intervention. In fact, the district court refused to allow counsel for the Smallwood Appellants an opportunity to bring the motion to intervene before it and expressly denied counsel for the Smallwood Appellants an opportunity to speak at the hearing.

In their summary judgment papers and at the hearing, Appellees contended that the 1997 Remedial Plan should be declared unconstitutional because it is the "fruit of the poisonous tree" of the redistricting plan held to be unconstitutional in *Shaw v. Hunt*. *See, e.g.*, Plaintiffs' Brief in Support of Motion for Preliminary Injunction at 4-5. Analogizing the 1997 redistricting process to a criminal trial in which evidence discovered as a result of information gained by

[5]While Appellees Cromartie and Muse were also plaintiffs in *Shaw v. Hunt*, they chose not to present their claims that the 1997 Remedial Plan was unconstitutional to the *Shaw* three-judge court.

an illegal search is admitted, Appellees argued that any remedial plan drawn by the legislature must be held unconstitutional unless the legislature completely discards the invalidated plan and develops its new plan without reference to even the lawful aspects of the prior plan. *Id.*

On April 3, 1998, a three-judge United States District Court for the Eastern District of North Carolina issued an order granting summary judgment to plaintiffs, declaring North Carolina's Twelfth Congressional District unconstitutional, permanently enjoining elections under the 1997 Remedial Plan, and ordering the State of North Carolina to submit a schedule for the General Assembly to adopt a new redistricting plan and to hold elections under that plan. NC. J.S. App. at 45a. The district court issued its judgment on April 6, 1998. NC. J.S. App. at 49a. Neither the order nor the judgment was accompanied by a memorandum opinion from the court.

Although the court had not yet released an opinion, the State moved for a stay of the injunction pending appeal. The district court denied this motion. The State then filed an application with this Court for a stay pending appeal, and the Smallwood Appellants filed an *amicus curiae* memorandum in this Court in support of the application. This Court denied the request for a stay on April 13, 1998, with Justices Stevens, Ginsburg, and Breyer dissenting.

On April 14, 1998, the district court issued its opinion explaining its April 3, 1998 order. The court accepted the uncontested affidavit testimony of Senator Roy A. Cooper, III that the legislature "aimed to identify a plan which would cure the constitutional defects and receive the support of a majority of the members of the General Assembly." NC. J.S. App. at 5a. The court also accepted the uncontroverted affidavit testimony

of Senator Cooper and Gary O. Bartlett, Executive Secretary-Director, State Board of Elections, that "[i]n forming a workable plan, the committees were guided by two avowed goals: (1) curing the constitutional defects of the 1992 plan by assuring that race was not the predominant factor in the new plan, and (2) drawing the plan to maintain the existing partisan balance in the State's congressional delegation." *Id.*

The court below found that the 1997 Remedial Plan met the goal of maintaining the existing partisan balances by "avoid[ing] placing two incumbents in the same district" and "preserv[ing] the partisan core of the existing districts to the extent consistent with the goal of curing the defects in the old plan." *Id.* at 5a-6a. Further, the court received no evidence that directly contradicted the testimony introduced by the State to the effect that the legislature sought, in creating the 1997 Remedial Plan, to cure the constitutional defects found by this Court by ensuring that race did not predominate in its creation while minimizing partisan and political disruption. *See id.* at 63a-64a. Nevertheless, the court below found that race was the predominant factor in the creation of the 1997 Remedial Plan based upon its own assessment of (a) District 12's racial demographics and shape, (b) the racial characteristics of a limited number of precincts that were included in or excluded from the district, and (c) mathematical measures of District 12's relative compactness. *Id.* at 6a-11a.

While the court asserted that "[a] comparison of the 1992 District 12 and the present District is of limited value here," *id.* at 19a, it concluded that District 12 in the 1997 Remedial Plan is as "unusually shaped" as was District 12 in the 1992 Plan. *Id.* Focusing exclusively on demographic data and the district's configuration, the court held that "the General

Assembly, in redistricting, used criteria with respect to District 12 that are facially race driven." *Id.* at 21a. Finally, despite extensive conflicting factual evidence, the court below concluded that "[t]he legislature disregarded traditional districting criteria such as contiguity, geographical integrity, community of interest, and compactness in drawing District 12 in North Carolina's 1997 plan." *Id.* at 21a-22a.

The court never proceeded to assess whether District 12 was narrowly tailored to satisfy a compelling justification, even though such inquiry is necessary upon a finding that strict scrutiny should apply to the redistricting plan.[6] Instead, the court concluded that the predominance of race in the creation of the district alone proved fatal to the district: "the General Assembly utilized race as the predominant factor in drawing the District, *thus* violating the rights to equal protection guaranteed in the Constitution to the citizens of District 12." *Id.* at 22a (emphasis added). Consequently, the court granted Appellees summary judgment as to District 12.

On May 26, 1998, with their two prior unopposed intervention motions still pending, the Smallwood Appellants

---

[6]Therefore, the court never considered or discussed whether the creation of District 12 could be justified by the State's compelling interest in remedying the current effects of North Carolina's long history of political exclusion and in avoiding dilution of minority voting strength. The court ignored evidence presented by the State that its "primary goals [of remedying the constitutional defects found in the 1992 Plan and preserving partisan balances in the congressional delegation] were accomplished while still providing minority voters a fair opportunity to elect representatives of their choice in at least two districts (Districts 1 and 12)," NC. J.S. App. at 64a, and that "[d]istrict 12 in the State's plan also provides the candidate of choice of African-American citizens a fair opportunity to win election." *Id.* at 66a.

filed a third motion to intervene as defendants in the case. On June 20, 1998, after the deadline for filing a timely notice of appeal of the district court's April 3, 1998 order and April 6, 1998 judgment, the district court ruled that the Smallwood Appellants were entitled to intervene as of right in this action. As the delay in granting the motions to intervene prevented them from fully participating as parties in the district court and prevented them from being able to exercise their right to appeal, the Smallwood Appellants filed in this Court on October 2, 1998 a motion to intervene as Appellants in this case. This Court granted the motion on October 19, 1998.

SUMMARY OF ARGUMENT

In holding that District 12 of the 1997 North Carolina Congressional Redistricting Plan ("1997 Remedial Plan") is unconstitutional, the court below erred in several critical respects. First, the court erred in resolving this case in favor of Appellees on their motion for summary judgment. The jurisprudence developed by this Court after *Shaw v. Reno* dictates that, in evaluating whether a redistricting plan violates the strictures of the Fourteenth Amendment, a court must engage in a searching evaluation into the intent of the legislature in creating the plan. This inquiry is fact-intensive and, as such, is particularly inappropriate for resolution through summary judgment. In this case, the State of North Carolina introduced substantial documentary and testimonial (affidavit) evidence to rebut the Appellees' allegation that race predominated in the legislative redistricting process. Without hearing any live witnesses or explicitly resolving the conflicts over material facts created by the parties' submissions, the court below granted summary judgment to the Appellees, thus committing reversible error.

Second, the court below erred in holding that race was the predominant factor in the creation of the Twelfth Congressional District. Appellees argued below that the 1997 Remedial Plan must be declared unconstitutional because it was the "fruit of the poisonous tree" (the plan invalidated by *Shaw v. Hunt*). In essence, Appellees assert that a State remedying a *Shaw* violation is required to do significantly more than correct the constitutional defect found in a challenged district. According to Appellees, the State must abandon every feature of the challenged plan and construct a new plan without regard to traditional districting concerns such as the partisan political makeup of the State's congressional delegation, incumbent protection, and avoiding unnecessary disruption of communities of interest. Appellees' theory is fundamentally at odds with this Court's precedents, finding no support in *Shaw* or its progeny or in the case law defining how courts evaluate remedial redistricting plans.

The lower court in effect endorsed this theory, according no deference to the State's policy choices in the redistricting process. This also was error. To the extent that the 1997 Remedial Plan did not violate any federal or state constitutional or statutory requirements, the district court was bound to approve the legislature's decisions.

The court further erred in holding the 1997 Remedial Plan unconstitutional based solely on its finding that race was one factor among many considered by the legislature in redistricting. In so ruling, the court failed to give any weight to the State's obligation to avoid minority vote dilution in redistricting, which necessarily meant that the legislature would have to be conscious of race in shaping the plan. This ruling is inconsistent with the Court's decisions in *Shaw* and its progeny

that require plaintiffs to show that race *predominated* in the redistricting process and *subordinated* traditional redistricting principles. Thus, the court's determination that the mere awareness of race in the redistricting process rendered the 1997 Remedial Plan unconstitutional is erroneous and must be reversed.

Third, even if the district court had correctly found that race was the predominant factor in the creation of the Twelfth District, it erred by not engaging in the required strict scrutiny analysis to determine if the State had a compelling justification and narrowly tailored the district to achieve that purpose

ARGUMENT

I. Summary Judgment was Inappropriate in this Case

A. Because this case involves an inquiry into the intent of the North Carolina legislature, it should not have been resolved through summary judgment

Under this Court's decisions, the "analytically distinct" claim recognized in *Shaw v. Reno*, 509 U.S. 630 (1993) requires a particularly fact-intensive inquiry and is therefore ill-suited to determination by summary judgment. Many factors influence the redistricting process, but only the predominance of one factor -- race -- will trigger strict scrutiny. *See Miller v. Johnson*, 515 U.S. 900, 913 (1995). Accordingly, a "searching inquiry is necessary before strict scrutiny can be found applicable." *Bush v. Vera*, 517 U.S. 952, 958 (1996).

In particular, resolution of this case will involve an inquiry into the intent of the North Carolina legislature through an examination of the motivation of legislators and an inquiry

into the justifications for creating the challenged districting plan. The ultimate conclusion about the predominance or non-predominance of race in the districting process is, as in other cases of intentional discrimination, purely factual. *Pullman-Standard v. Swint*, 456 U.S. 273, 289 (1982). But because the crucial facts at issue involve intent, they are rarely appropriate for determination on summary judgment. *See Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464, 473 (1962) ("We believe that summary procedures should be used sparingly in complex antitrust litigation where motivation and intent play leading roles, the proof is largely in the hands of alleged conspirators, and hostile witnesses thicken the plot").[7]

The lower federal courts have found summary judgment procedures particularly inappropriate in cases where intent is a critical issue and have made sparing use of the remedy. *E.g.*, *Lipsett v. University of Puerto Rico*, 864 F.2d 881, 895 (1st Cir. 1988) (*citing Poller*). *See Stepanischen v. Merchants Despatch Transportation Corp.*, 722 F.2d 922, 928 (1st Cir. 1983); *Bronze Shields, Inc. v. New Jersey Department of Civil Service*, 667 F.2d 1074, 1087 (3d Cir. 1981), *cert. denied*, 458 U.S. 1152 (1982). *See also Smith v. University of North Carolina*, 632 F.2d 316, 338 (4th Cir. 1980) (lower court did not err in denying motion for summary judgment where genuine issue of material fact existed regarding the reasons underlying

[7]To be sure, such cases may still be resolved on summary judgment where the party opposing summary disposition fails to "offer[] any concrete evidence from which a [factfinder] could return a [judgment] in his favor." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986) (distinguishing *Poller*). As we discuss below, however, that was not at all the situation in the instant matter. The State of North Carolina introduced substantial evidence that would support a judgment in its favor and was certainly sufficient to prevent entry of summary judgment for Appellees.

the defendant's decision not to appoint or promote the plaintiff). Courts have noted that when the disputed issues concern intent or motivation, judgments about the credibility of witnesses by the finder of fact are of special importance and utility. *See, e.g.*, *Ross v. Communications Satellite Corp.*, 759 F.2d 355, 364 (4th Cir. 1985). Consequently, the need for a court to engage in the difficult process of assessing the motivation, state of mind, and credibility of a decision maker is, by itself, a sufficient basis for denying summary judgment. *See* 10B Charles A. Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 2730 (1998 ed.).

Attempting to determine the role that race played in the redistricting process is a necessarily fact-intensive inquiry, requiring a court to engage in an exhaustive review of the legislative process. *See Bush v. Vera*, 517 U.S. at 959 (in "mixed motive" cases, "careful review" is necessary to determine application of strict scrutiny to electoral districts). Resolving the difficult question of legislative intent requires a review of direct evidence, such as the statements and testimony of legislators, as well as circumstantial evidence, such as district shape and demographics.

These principles are reflected in the post-*Shaw* jurisprudence. In every case where a court has struck down a district pursuant to *Shaw*, it has relied on evidence, gained after a thorough review of the redistricting process, that race was the predominant factor in districting. For example, in *Johnson v. Miller*, 864 F. Supp. 1354 (S.D. Ga. 1994), *aff'd*, 515 U.S. 900 (1995), the district court determined that race was the legislature's dominant consideration in districting only after engaging in a detailed review of Georgia's submissions to the Department of Justice in the preclearance process under Section

5 of the Voting Rights Act. Recognizing that legislative redistricting is the end result of balancing many factors, 864 F. Supp. at 1363, the court conducted an exhaustive review of committee meetings and debates, *id.* at 1363-68, competing proposals considered by the legislature, *id.* at 1363, the extent and type of computer assistance utilized during the redistricting process, *id.* at 1363 n.2, advocacy positions adopted by individual legislators, *id.* at 1363, Section 5 submission materials, *id.* at 1376, and legislative reaction to the denial of preclearance, *id.* at 1363-66. The court reviewed documentary evidence on each of these subjects and also heard direct testimony from those involved with the legislative process in order to put that evidence in its proper context.

The district court in *Vera v. Richards*, 861 F. Supp. 1304 (S.D. Tex. 1994), *aff'd sub nom. Bush v. Vera*, 517 U.S. 952 (1996), also premised its determination that race predominated on a thorough review of the intricacies of the challenged redistricting process. The court reviewed transcripts of and testimony about the legislature's floor debates and regional outreach hearings, *id.* at 1313-14, Section 5 submissions, *id.* at 1315, alternative redistricting plans considered during the legislative process, *id.* at 1330-31, newspaper articles published before and during the redistricting process, *id.* at 1319, and the use of racial data in the drawing of boundary lines, *id.* at 1318-19. Moreover, the court looked beyond the bounds of the challenge at issue to review testimony of legislators in previous litigation regarding the same redistricting process. *Id.* at 1319-21, 1324. As a result, the court was able to ferret out inconsistencies and conclude that "the testimony submitted in this racial gerrymandering case is at first glance starkly at odds with the explanation for the district's

severely contorted boundaries offered in [the previous litigation]." *Id.* at 1321.

In *Smith v. Beasley*, 946 F. Supp. 1174 (D.S.C. 1996), the district court conducted a similar review of the entire legislative process before determining that race dominated the redistricting experience, including a review of statements and evidence presented in related litigation and testimony before legislative committees. *See, e.g., id.*, 946 F. Supp. at 1178-87. In making this thorough review, the court took note of the lack of legislative "hearings or evidence or findings as to" compliance with traditional redistricting factors and compliance with Section 2 of the Voting Rights Act, concluding that these omissions were evidence that race was the predominant factor. *Id.* at 1192-93.

Courts have not reviewed the statements and actions of legislators in a vacuum, nor have they focused solely on legislators' or observers' statements regarding the role of race in the redistricting process. Rather, consistent with this Court's *Shaw* jurisprudence, they have also examined the influence of "traditional" redistricting factors and alternative justifications for district configurations. *See, e.g., Bush v. Vera*, 517 U.S. at 959 (discussing significance of traditional districting principles). In determining the extent to which traditional districting factors have played a role, courts have looked to demographic data, the shape of the challenged districts, the legislature's use of racial data, the legislature's consideration and protection of communities of interest, protection of incumbent interests, and the history of discrimination in the jurisdiction. *See, e.g., Vera*, 861 F. Supp. at 1311 (review of racial demographics and comparison of 1980 and 1990 census); *id.* at 1309 (examining availability of racial data relative to

availability of data on other districting factors); *Miller*, 864 F. Supp. at 1375-76 (reviewing substantial evidence received from expert witnesses, religious leaders, community activists, and legislators regarding communities of interest); *Vera*, 861 F. Supp. at 1322 (same); *Vera*, 861 F. Supp. at 1312, 1317 (extensive review of incumbency interests including historical accommodations, alternative incumbent-sponsored plans, negotiations, and maps). It is only after finding that the evidence "advertises 'disregard' for these considerations in favor of race-based line drawing," that a court can safely conclude that race was the predominant factor affecting a given districting plan. *Miller*, 864 F. Supp. at 1369.

No such intensive factual inquiry was conducted by the court below, despite substantial conflicting evidence on the key issues of purpose and intent submitted by the parties, which should have occasioned an evidentiary hearing. Instead, and contrary to the decisional principles announced and applied in the cases discussed above, the court ignored all factual complexities, disregarded state legislators' sworn affidavits without hearing their testimony and judging their credibility, and granted summary judgment to plaintiffs. Unlike the courts discussed above, each of which weighed a substantial body of evidence and considered the multiplicity of factors relevant to a legislature's redistricting efforts, the court below reached its conclusion merely by reviewing the configuration of the challenged district and examining statistics about a few of the more than 150 precincts included within it -- then ruling summarily in favor of the Appellees. That error warrants reversal of its judgment.

B. Because this case necessarily concerns issues arising under the Voting Rights Act, it should not have been resolved through summary judgment

Evidence was presented in this case that the configuration of the 1997 Remedial Plan was justified by the State's need to comply with Section 2 of the Voting Rights Act, 42 U.S.C. § 1973, so as to ensure that minority voting strength was not diluted during the redistricting process. In order to determine if compliance with the Act is a compelling justification for a particular plan in a particular jurisdiction, a district court would be required to examine the evidence relating to proving a vote dilution claim under Section 2. This inquiry is also not well suited for summary adjudication.

In assessing whether a given plan dilutes minority voting strength, this Court requires trial courts to engage in "a searching practical evaluation of the past and present reality" based on a "functional view of the political process." *Thornburg v. Gingles*, 478 U.S. 30, 45 (1986) (internal citation and quotation omitted). The Court has instructed that this inquiry should include an examination of the history of political discrimination in the jurisdiction, the extent of racially polarized voting, and the extent to which minorities have been elected to political office. *Id.* at 44-45. This inquiry is fact-intensive and, given the depth of the analysis required, courts are reluctant to grant summary judgment in cases involving Section 2, preferring instead to evaluate disputes over the three *Gingles* preconditions, and conclusions based upon the totality of the circumstances, after a trial. *See, e.g., Jeffers v. Clinton*, 839 F. Supp. 612, 616 (E.D. Ark. 1993) (denying summary judgment in Section 2 case where material issues remained unresolved

since "information needed to determine district lines and population percentages" in hypothetical plan offered by plaintiffs to establish first *Gingles* precondition was disputed by the parties); *Johnson v. DeSoto County Board of Commissioners*, 868 F. Supp. 1376, 1382 (M.D. Fla. 1994) (summary judgment denied because "under the totality of the circumstances, Plaintiffs' ability to meet the third necessary condition is a genuinely disputed material issue of fact which precludes summary judgment"), *rev'd on other grounds*, 72 F.3d 1556 (11th Cir. 1996); *Mallory v. Eyrich*, 707 F. Supp. 947, 954 (S.D. Ohio 1994) (denial of summary judgment to permit full development of record in order to determine the proper interpretation of the facts and to resolve disputed expert analysis). Indeed, the district court in *Johnson v. DeSoto County Board of Commissioners* held that "[t]he degree of racial bloc voting that is cognizable as an element of a § 2 vote dilution claim will vary according to a variety of factual circumstances." 868 F. Supp. at 1382 (citing *Gingles*, 478 U.S. at 57-58). In denying the motion for summary judgment in the *DeSoto* case, the court noted that under the totality of the circumstances, determining minority voters' ability to participate equally in the political process necessarily requires "an intense local appraisal of the design and impact" of the disputed electoral schemes. *Id.* (citing *Gingles*, 478 U.S. at 79).

In deciding cases brought under the *Shaw* regime, district courts typically inquire and draw conclusions regarding the role of Voting Rights Act considerations in the redistricting process only after a trial on the merits. For example, in *Vera*, the district court acknowledged that "the Legislature embarked upon Congressional redistricting against the legal backdrop of the Voting Rights Act," 861 F. Supp. at 1314, and proceeded

to examine factors typically at issue in voting rights litigation. Relying on testimony before the legislature on the requirements of the Voting Rights Act and the narrative included with the State's Section 5 submissions, the court sought to ascertain the legislature's interpretation of the requirements of the Voting Rights Act. *Id.* at 1315-16. The court's review also included consideration of Texas' "well-documented history of discrimination" in the electoral process, as well as extensive, yet conflicting, evidence from social scientists, community activists, and legislators regarding racial polarization in Texas and the existence of coalition voting between African-American and Hispanic voters, as well as white bloc voting. *Id.* at 1315-17.

Similarly, in *Smith v. Beasley*, the court sought to determine the role the Voting Rights Act played in the South Carolina redistricting process through a review of the redistricting subcommittee's guidelines for addressing the requirements of Sections 2 and 5 of the Voting Rights Act, and evidence establishing that "in South Carolina, voting has been, and still is, polarized by race." 946 F. Supp. at 1179, 1202.

The district court in this case never engaged in the level of analysis necessary to evaluate whether the creation of the 1997 Remedial Plan was justified in light of the State's responsibilities under the Voting Rights Act. Indeed, if the district court had timely recognized the Smallwood Appellants' right to intervene before ruling, they would have occupied a role similar to the one assumed by the defendant-intervenors in *Shaw v. Hunt*,[8] introducing evidence and presenting arguments concerning the State's responsibilities under the Voting Rights Act. For example, as parties, the Smallwood Appellants would

---

[8] *See supra* note 4.

have presented evidence regarding the history of political exclusion of the State's African-American population and would have argued that the State was required to consider this history, and take particular care not to dilute minority voting strength, in fashioning a remedy for the constitutional violation found by this Court. Also, the Smallwood Appellants could have introduced evidence showing that the Appellees' proposed plans might be vulnerable to an attack under Section 2 of the Voting Rights Act.

Because *Shaw* cases often involve issues arising under the Voting Rights Act, they require full development of the underlying facts for proper resolution, which will ordinarily necessitate evidentiary hearings. *See County Council v. United States*, 555 F. Supp. 694, 706 (D.D.C. 1983) (resolution of issues raised by violations of Section 5 and Section 2 of the Voting Rights Act "depends on facts which should be developed at trial"); *City of Rome v. United States*, 450 F. Supp. 378, 384 (D.D.C. 1978) (determination of issues raised by the Voting Rights Act should be resolved after a full opportunity for discovery). For this reason, the grant of summary judgment below was erroneous.

II. The District Court Erred in Ruling that Race Was the Predominant Factor in the Creation of the Twelfth Congressional District

A. The court erred in sanctioning the Appellees' argument that race predominated in the development of the 1997 Remedial Plan because that plan did not evidence the legislature's complete abandonment of the 1992 Plan as a starting point for fashioning the remedy.

The Appellees proposed below, and the district court tacitly approved, a requirement that the State abandon the previously challenged plan in its entirety and develop a remedial plan without reference to any of the features of the prior plan, including even the race-neutral redistricting principles the State chose to recognize in fashioning the earlier plan. As discussed *supra* in the Statement of the Case, Appellees argued below that the 1997 Remedial Plan must be declared unconstitutional because it was the "fruit of the poisonous tree" (the plan invalidated by *Shaw v. Hunt*).

Appellees' "fruit of the poisonous tree" theory would require a state remedying a *Shaw* violation to do substantially more than correct the constitutional defect found in a challenged district; under Appellees' approach, nothing less than the complete reconstruction of the invalidated plan is an adequate remedy for the constitutional violation. This novel theory is fundamentally at odds with this Court's precedents. There is no support in the decisions of this Court for the contention that a redistricting plan drawn to remedy a constitutional violation under *Shaw* is constitutionally invalid unless the State completely discards its original plan and

abandons even the traditional, race-neutral redistricting considerations that were recognized in the original plan.

Appellees are entitled only to have the legislature devise a plan in which traditional, race-neutral redistricting principles are not needlessly subordinated to racial considerations. The "fruit of the poisonous tree" argument places the State in the untenable position of ignoring the complicated mix of factors that necessarily and legitimately influence the redistricting process, in order to cure the prior constitutional violation. This approach makes little real-world sense. The drafter of a remedial plan designed to cure a defect in one district in a prior plan must, of necessity, consider a substantial body of political, geographic, and demographic data, as well as one-person, one-vote requirements and traditional redistricting policies in the jurisdiction. Decisions about reshaping the challenged district simply cannot be made without regard to their effect on the overall plan, including their effect on prior partisan political balances. It would, therefore, be entirely realistic for a State to seek to make the fewest alterations possible to a plan, if doing so would assist in meeting its other redistricting goals.

Appellees' argument would seriously impact settlement and remedial possibilities in voting rights cases, as it would dramatically limit States' abilities to develop plans that cure statutory and Constitutional objections while also taking into consideration legitimate political interests and other race-neutral redistricting criteria.

Rather than demand that a State forsake the myriad interests that it attempted to recognize and promote in a challenged plan, this Court has consistently accorded great deference to the States' policy choices in the redistricting process and has repeatedly held that the redistricting policy

choices of the State should be set aside by a federal court only to the extent necessary to remedy a violation of federal law. *See, e.g., White v. Weiser*, 412 U.S. 783, 795 (1973) (in devising a remedy for a federal constitutional violation, a court "should follow the policies and preferences of the State, expressed in statutory and constitutional provisions or in reapportionment plans proposed by the state legislature, whenever adherence to state policy does not detract from the requirements of the Federal Constitutions"); *see also Voinovich v. Quilter*, 507 U.S. 146, 156 (1993) ("[F]ederal courts are bound to respect the States' apportionment choices unless those choices contravene federal requirements").

When a legislative body devises a remedial plan, a court must "accord great deference to legislative judgments about the exact nature and scope of the proposed remedy." *McGhee v. Granville County*, 860 F.2d 110, 115 (4th Cir. 1988). *See also White v. Weiser*, 412 U.S. at 795-96 (1973); *Tallahassee Branch of NAACP v. Leon County*, 827 F.2d 1436, 1440 (11th Cir. 1987). Where, as here, the State has enacted a new plan that fully remedies the *Shaw* violation and complies with all applicable federal and state constitutional and statutory provisions, there is no basis for federal judicial interference with its implementation. *Wise v. Lipscomb*, 437 U.S. 535, 540 (1978); *see also Burns v. Richardson*, 384 U.S. 73, 85 (1966) ("A State's freedom of choice to devise substitutes for an apportionment plan found unconstitutional, either as a whole or in part, should not be restricted beyond the clear commands of the Equal Protection Clause"); *Shaw v. Hunt*, 517 U.S. at 899 n.9 ("states retain broad discretion in drawing districts to comply with the mandate of § 2") (citing *Voinovich v. Quilter*, 507 U.S. 146 (1993) and *Growe v. Emison*, 507 U.S. 25

(1993)).

Moreover, States such as North Carolina have a legitimate interest in minimizing disruption to their political process by, for example, ensuring that incumbents are protected, prior partisan balances are maintained, and districts surrounding the invalidated district(s) are preserved intact to the extent possible in a remedial plan.[9] In fact, this Court and lower courts have recognized the necessity for jurisdictions to consider these issues as they devise remedial plans and have thus accorded states broad deference in the redistricting process. *See, e.g., Lawyer v. Department of Justice*, 521 U.S. ___, 117 S. Ct. at 2192-3 (1997), *aff'g Scott v. United States*, 920 F. Supp. 1248, 1255 (M.D. Fla. 1996); *Shaw v. Hunt*, 517 U.S. at 899 n.9; *Miller v. Johnson*, 515 U.S. at 915; *Upham v. Seamon*, 456 U.S. 37, 42 (1982); *White v. Weiser*, 412 U.S. at 794-95 (1973).[10]

---

[9]Although it is undisputed that the State sought to protect all of the incumbent members of the congressional delegation and preserve the partisan balance of six Democrats and six Republicans that resulted from elections held under its original plan, Appellees have suggested that the State must exclude the Twelfth District's African-American Congressman from such protection. *See* Motion to Dismiss or, in the Alternative, to Affirm at 27. By arguing that it was *per se* unconstitutional for the State to protect the incumbency of the Twelfth District's African-American Congressman to the same extent as it protected other incumbent members of Congress, Appellees urge the adoption of a double standard that is intolerable under the decisions of this Court. *See, e.g., Miller v. Johnson*, 515 U.S. at 928 (O'Connor, J., concurring); *Shaw v. Hunt*, 517 U.S. at 996 (Kennedy, J., concurring).

[10]This is consistent with this Court's longstanding view that the governmental entity must be given the first opportunity to propose a remedial plan after a voting rights violation is found. *McDaniel v. Sanchez*, 452 U.S. 130, 150 n.30 (1981).

This Court's decision last term in *Lawyer* underscores the district court's error in adopting Appellees' "fruit of the poisonous tree" theory. Both the district court in *Scott* and this Court in *Lawyer* upheld a Florida state legislative district that was redrawn after a finding of a *Shaw* violation. This Court upheld the remedial district notwithstanding (a) its resemblance to the original plan's 21st Senate District, (b) the fact that the plan's drafters used the original 1992 redistricting plan as a starting point, and (c) the district's continued majority-minority status. Neither this Court nor the district court deemed Florida's remedial plan "tainted" simply because it used the challenged plan as its base. Moreover, neither court questioned Florida's stated, race-neutral interest in preserving electoral stability by avoiding needless disruption of the political relationships that had developed between the time of the original enactment of the challenged plan and the date that the remedial plan was devised.

If the court below had properly applied these principles, it would have rejected appellees' "fruit of the poisonous tree" argument and approved the 1997 Remedial Plan. The district court was bound to approve the legislature's remedial plan to the extent that it did not violate any federal or state constitutional or statutory requirements. The court below did not have the remedial power, and the Appellees do not have a constitutional right, to dictate the State's redistricting priorities beyond what is required to eliminate the equal protection violation this Court initially found in *Shaw v. Hunt*. This Court should therefore reverse the district court's erroneous adoption of the "fruit of the poisonous tree" theory and approve the 1997 Remedial Plan enacted by the North Carolina legislature.

B. In jurisdictions such as North Carolina, with a history of prior discrimination and minority vote dilution, and in which voting patterns remain racially polarized, districting must be sufficiently race-conscious to avoid violating Section 2 of the Voting Rights Act, but that circumstance does not establish that race "predominates" so as to trigger "strict scrutiny."

As noted *supra* in the Statement of the Case, the court below failed to assess most of the evidence presented by the parties on Appellees' motion for summary judgment. Instead, the court recited statistics concerning the racial composition and political party registration of voters in a small number of precincts placed within or without the Twelfth District by the 1997 Remedial Plan adopted by the North Carolina General Assembly. Without even addressing the other factors that state legislators took into account in the redistricting process, the court concluded from its limited factual recitation not only that the Remedial Plan was race-conscious, but also that it must be struck down.

In the circumstances of this case, this ruling amounted to a holding, contrary to this Court's repeated admonitions, that race-conscious districting is presumptively unconstitutional. Because such a rule is incapable of rational application, would eviscerate the protections against minority vote dilution provided by Section 2 of the Voting Rights Act of 1965, 42 U.S.C. § 1973, and is flatly inconsistent with this Court's *Shaw* decisions, the judgment below must be reversed.

As this Court has held, Appellees' evidentiary burden in this case is to show that "race for its own sake, and not other

districting principles, was the legislature's dominant and controlling rationale in drawing its district lines," *Bush v. Vera*, 517 U.S. at 952, *quoting Miller v. Johnson*, 515 U.S. at 913, and "that other, legitimate districting principles were 'subordinated' to race." *Bush*, 517 U.S. at 958. *See generally id.* at 259-68. It is insufficient for Appellees to show, as they attempted to do here, merely that inclusion of African-American voters was one factor influencing the contours of a district in the plan adopted by the legislature – or even that the entire districting process was carried out "with consciousness of race," *Bush*, 517 U.S. at 1051. As Justice O'Connor has observed:

> States may intentionally create majority-minority districts and may otherwise take race into consideration, without coming under strict scrutiny. Only if traditional districting criteria are neglected, *and* that neglect is predominantly due to the misuse of race, does strict scrutiny apply.

Bush, 517 U.S. at 993. (O'Connor, J., concurring) (emphasis in original); *see also United States v. Hays*, 515 U.S. 737, 745 (1995) ("We recognized in *Shaw*. . .that the 'legislature always is *aware* of race when it draws district lines, just as it is aware of age, economic status, religious and political persuasion, and a variety of other demographic factors. That sort of race consciousness does not lead inevitably to impermissible race discrimination'") (citation omitted) (emphasis in original).

In *Shaw v. Reno*, 509 U.S. at 653, this Court held that it would be the extraordinary case in which strict scrutiny would apply. Indeed, in *Shaw*, *Miller*, and *Bush*, the district courts applied strict scrutiny only after they determined that race played a *predominant* role in the design of the districts at issue. *Miller*, 515 U.S. at 928 (O'Connor, J., concurring); *Shaw v.*

Hunt, 517 U.S. at 903; *Bush*, 517 U.S. at 952. And those determinations were not based upon mere "race consciousness." For example, in *Shaw*, a full trial on the merits developed what this Court termed sufficient "direct evidence" that the State's "overriding purpose" was to "create two congressional districts with effective black voting *majorities*" and that other considerations "came into play only after the race-based decision had been made." *Shaw*, 517 U.S. at 906 (original emphasis omitted and emphasis added). In *Miller*, the State conceded that the district at issue was the "product of a desire by the General Assembly to create a *majority black district*," *Miller*, 515 U.S. at 918 (emphasis added), and that the creation of the district would "violate all reasonable standards of compactness and contiguity." *Id.* at 919. In granting summary judgment to Appellees in this matter, the court below made no such findings.

Equally significant, the court below failed to give any consideration – much less appropriate weight – to the need of the North Carolina General Assembly, in any redistricting that it undertook, to be sufficiently "race conscious" so as to avoid diluting minority voting strength. Although the General Assembly's primary goals in enacting the 1997 Remedial Plan were to correct the prior constitutional violation found by this Court in *Shaw v. Hunt* and to preserve the congressional delegation's partisan balance, the State was also under an obligation to fulfill these objectives without diluting minority voting strength.

In *Shaw v. Hunt*, the Court assumed without argument that "§ 2 could be a compelling interest" justifying even a plan drawn *predominantly* on a racial basis, if the "[North Carolina] General Assembly believed a second majority-minority district

was needed in order not to violate § 2, and. . .the legislature at the time it acted had a strong basis in evidence to support that conclusion" when it created the 1992 plan. *Shaw*, 517 U.S. at 914.[11] *See also Miller*, 515 U.S. at 915 (race-consciousness in drawing district lines would not alone render a districting plan presumptively unconstitutional).

Similarly, in *Bush* this Court stated that "[s]trict scrutiny does not apply merely because redistricting is performed with consciousness of race. . . . Nor does it apply to all cases of intentional creation of majority-minority districts." 517 U.S. at 958 (citations omitted). The point is further emphasized by Justice O'Connor's separate concurrence in *Bush*, which makes clear that nothing in *Shaw* or its progeny should be interpreted as calling into question the continued importance of complying with Section 2 of the Voting Rights Act. *See id.* at 990. (O'Connor, J., concurring).

Justice O'Connor specifically concluded that States have a compelling interest in complying with Section 2 of the Voting Rights Act "as this Court has interpreted it," *id.* at 992.[12]

---

[11]The Court nonetheless held the 1992 Plan unconstitutional because, it found, District 12 in that 1992 Plan did not encompass a reasonably geographically compact minority population and, therefore, "where that district sits," "'there neither has been a wrong nor can there be a remedy.'" 517 U.S. at 916. The Court explained that "[w]here, as here, we assume avoidance of § 2 liability to be a compelling state interest, we think that the racial classification would have to realize that goal; the legislative action must, at a minimum, remedy the anticipated violation or achieve compliance to be narrowly tailored." *Shaw*, 517 U.S. at 915-16 (footnote omitted).

[12]Four other members of the Court clearly agree with Justice O'Connor that States have a compelling interest in avoiding minority vote

Justice O'Connor went on to find that Texas had a strong basis to believe that a majority-minority district should be drawn in Dallas, because voting was racially polarized and it was possible to draw a reasonably compact district with a substantial African-American population. *Id.* at 994.[13] Thus, Justice O'Connor's opinion confirms that reasonably compact majority-black districts are not inevitably subject to challenge under the "analytically distinct" constitutional claim recognized in *Shaw v. Reno*, and that States continue to have a compelling interest in complying with the Voting Rights Act. *See also Lawyer v. Department of Justice*, 521 U.S. 567 (1997) (upholding the constitutionality of a Florida state legislative districting plan that was drawn with conscious consideration of race to settle litigation challenging prior plan, creating majority-minority district that afforded minority voters opportunity to elect candidates of choice that was somewhat irregularly shaped and that split county and city boundaries); *Abrams v. Johnson*, 521 U.S. 74 (1997) (approving congressional districting plan for Georgia having majority-black district); *King v. State Board of Elections*, ___ U.S. ___, 118 S. Ct. 877 (1998) (*per curiam*) (summarily affirming district court ruling upholding the constitutionality of Illinois' Fourth Congressional District).

---

dilution and in complying with Section 2 of the Voting Rights Act notwithstanding their dissent from the decision to invalidate the challenged North Carolina and Texas plans. *See Bush*, 517 U.S. at 1003 (Stevens, J., joined by Ginsburg and Breyer, JJ., dissenting); *id.* at 1045 (Souter, J., joined by Ginsburg and Breyer, JJ., dissenting).

[13]However, because Texas had *not* drawn a reasonably compact district, Justice O'Connor concluded that the district was subject to strict scrutiny and was not narrowly tailored to effectuate the State's compelling interest in avoiding minority vote dilution and complying with the Act. *Id.* at 994.

DeWitt v. Wilson, 856 F. Supp. 1409, 1413-14 (E.D. Cal. 1994) (intentional creation of majority-minority districts does not violate Constitution when redistricting plan "evidences a judicious and proper balancing of the many factors appropriate to redistricting, one of which was the consideration of the application of the Voting Rights Act's objective of assuring that minority voters are not denied the chance to effectively influence the political process"), *aff'd*, 515 U.S. 1170 (1995).[14]

Thus, even if the Twelfth Congressional District created by the 1997 Remedial Plan had been a majority-minority district – which it is not – that would not compel its invalidation. To hold otherwise in reviewing a redistricting measure from a State such as North Carolina, which has a long history of official discrimination against African Americans, including through creation of electoral plans that diluted their voting strength, *see Thornburg v. Gingles*, and in which there continues to be an evident pattern of racially polarized voting, would effectively nullify Section 2 of the Voting Rights Act. It would label any district that matched the hypothetical one described by plaintiffs in a Section 2 case to meet the first *Gingles* precondition, *see* 478 U.S. at 49, as the product of a "racial gerrymander" condemned by *Shaw*, notwithstanding this Court's repeated statements that *Thornburg* and *Shaw* can coexist so long as remedial Section 2 plans are narrowly tailored. Nothing in this

---

[14]A further understanding of the *DeWitt* decision can be gained by reviewing the decision of the California Supreme Court that created the redistricting plans challenged in *DeWitt*. *See Wilson v. Eu*, 823 P.2d 545, 563-64, 582, 583-84, 594, 1 Cal. 4th 707, 746, 776, 775, 790, 4 Cal. Rptr. 2d 379, 397-8, 416, 417-8, 428 (1992) (describing the various special efforts taken to create districts that would comply with the Voting Rights Act).

Court's decisions suggests that such a rule is correct.

Indeed, this Court's decision in *Lawyer* is directly to the contrary. *Lawyer* is the only case considered by this Court in the post-*Shaw* era that involves a legislatively drawn plan created to remedy alleged constitutional violations. There, the district court approved a settlement plan that reduced the total minority voting-age population in the challenged district from an original 55.3 percent to 51.2 percent through reconfiguration of the district to one that was characterized as still somewhat oddly shaped, albeit "less strained and irregular." *Scott v. United States*, 920 F. Supp. 1248, 1255 (M.D. Fla. 1996), *aff'd sub nom. Lawyer v. Department of Justice*, 521 U.S. 567 (1997). The most important consideration for the district court in determining whether it would approve the new boundaries was that the new plan "offers to any candidate, without regard to race, the opportunity to seek elective office and both a fair chance to win and the usual risk of defeat." 920 F. Supp. at 1256.

In affirming its judgment, this Court noted that the district is not majority-black, a factor that it said "supports the District Court's finding that the district is not a 'safe' one for black-preferred candidates, but one that 'offers to any candidate, without regard to race, the opportunity' to seek and be elected to office." *Lawyer*, 521 U.S. at ___, 117 S. Ct. at 2195 (quoting and citing *Scott*, 920 F. Supp. at 1256). Accordingly, this Court upheld the settlement, finding that race did not predominate and subordinate Florida's traditional redistricting criteria. *Id.* at 2195.

The Court of Appeals for the Fifth Circuit applied the same principles in *Clark v. Calhoun County*, 88 F.3d 1393 (5th Cir. 1996) (Higginbotham, J.). There, the unanimous panel

specifically rejected the argument made by defendants that there could be no constitutional remedy for plaintiffs' claimed Section 2 violation because creation of a district that matched one of the illustrative "*Gingles* factor one" plans would require that race predominate in the redistricting process, in violation of *Miller v. Johnson*. The Fifth Circuit recognized that this argument was the equivalent of declaring all majority-minority districts to be *per se* unconstitutional, contrary to this Court's holdings. Instead, it ruled, a race-conscious Section 2 remedial plan is acceptable if it is narrowly tailored and it "'substantially addresses'" the violation and "does not deviate substantially from a hypothetical court-drawn § 2 district for predominantly racial reasons." *Clark*, 88 F.3d at 1405 (quoting *Bush*, 517 U.S. at 994 (O'Connor, J., concurring), 996 (Kennedy, J. concurring) and citing *Shaw v. Hunt*, 517 U.S. at 997).

As in *Lawyer* and *Clark*, the 1997 Remedial Plan approved by the original district court in *Shaw v. Hunt* passes constitutional muster and should have been accepted by the court below. District 12 in that plan is significantly more compact geographically than it was in the 1992 Plan. The new District 12 contains parts of six counties, rather than ten, and it does not have any areas of only "point contiguity." In the 1992 plan, District 12's boundaries divided 48 precincts, while the 1997 Remedial Plan divides only one. The boundaries of the new District 12 were determined by partisan considerations and a desire to have an urban, Democratic district in the Piedmont region. *See* NC. J.S. App. at 72a-75a (Affidavit of Senator Roy A. Cooper, III); *Id.* at 81a-82a (Affidavit of Representative W. Edwin McMahan). District 12's African-American voting-age population was reduced from the original 53.34 percent in the 1992 plan to 43.36 percent. Jt. App. at 111 - 115. Finally, to

the extent that race was considered in fashioning the district, it did not predominate because the new district is "narrowly tailored" to address North Carolina's continuing obligation to avoid diluting minority voting strength in the course of remedying the prior constitutional wrong.

The contrary conclusion of the court below was erroneous both as a matter of fact and as a matter of law and should be reversed.

III. Even if Race Predominated in its Creation, the District Court Erred in Never Determining if the State had a Compelling Justification for Creating a Narrowly Tailored District 12

Even if, *arguendo*, the district court was correct to find that race was the predominant factor in the drawing of District 12, it was error for the court not to consider whether it was narrowly tailored to achieve a compelling governmental interest. As discussed, the district court concluded that, in drafting the 1997 Remedial Plan, the State disregarded traditional redistricting criteria and found that race was the predominant factor in the creation of District 12. But, the court never engaged in a strict scrutiny analysis, assessing whether District 12 was narrowly tailored to satisfy a compelling justification. Rather, the court determined that its finding of the predominance of racial considerations alone was sufficient to condemn District 12.

Even if a court finds that race predominated in the redistricting process, its inquiry does not end. This Court's *Shaw* jurisprudence requires that a court assess whether there was a compelling justification for a plan drawn with race as a predominant factor, and whether the plan was narrowly tailored

to serve that justification. *See, e.g., Shaw*, 517 U.S. at 914 (assuming without argument that "§ 2 could be a compelling interest"); *Miller*, 515 U.S. at 915 (race-consciousness in drawing district lines would not alone render a districting plan presumptively unconstitutional).

If the district court had engaged in this analysis, for the reasons discussed above it would have had to conclude that the 1997 Remedial Plan is justified. As discussed, the summary judgment record indicates that, in creating the plan, the legislature was aware of North Carolina's long history of official discrimination against African-Americans and their exclusion from the political process due to state and private action. Moreover, there was evidence that the State sought to "provid[e] minority voters a fair opportunity to elect representatives of their choice in at least two districts (Districts 1 and 12)," NC. J.S. App. at 64a, and that District 12 does afford African-American voters a fair chance to elect their candidate of choice. *See* NC. J.S. App. at 66a. The district court erred in not engaging in the rigorous strict scrutiny inquiry required by this Court.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment of the district court and enter judgment for defendants. In the alternative, this Court should vacate the judgment of the district court and remand the case for trial.

Respectfully submitted,

ELAINE R. JONES
Director-Counsel
THEODORE M. SHAW
NORMAN J. CHACHKIN
JACQUELINE A. BERRIEN
VICTOR A. BOLDEN
DEBORAH N. ARCHER
NAACP LEGAL DEFENSE
& EDUCATIONAL FUND, INC.
99 Hudson Street, Suite 1600
New York, NY 10013
(212) 219-1900

ADAM STEIN
FERGUSON, STEIN, WALLAS,
ADKINS, GRESHAM &
SUMTER, P.A.
312 West Franklin Street
Chapel Hill, NC 27516
(919) 933-5300

TODD A. COX*
NAACP LEGAL DEFENSE
& EDUCATIONAL FUND, INC.
1444 Eye Street, NW
10th Floor
Washington, DC 20005
(202) 682-1300

**Counsel of Record*

Attorneys for Appellant-Intervenors

(5)

FILED
NOV 10 1998
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 98-85

In the

Supreme Court of the United States

October Term, 1998

JAMES B. HUNT, JR., *et al.*,

Appellants,

and

ALFRED SMALLWOOD, *et al.*,

Intervenor-appellants,

v.

MARTIN CROMARTIE, *et al.*,

Appellees.

On Appeal from the United States District Court
Eastern District of North Carolina

STATE APPELLANTS' BRIEF ON THE MERITS

MICHAEL F. EASLEY
North Carolina Attorney General

Edwin M. Speas, Jr.,* Chief Deputy Attorney General
Tiare B. Smiley, Special Deputy Attorney General
Melissa L. Saunders, Special Counsel to Attorney General
North Carolina Department of Justice
Post Office Box 629
Raleigh, North Carolina 27602-0629
Telephone: (919) 716-6900

Walter E. Dellinger
Crystal Nix
O'Melveny & Myers, LLP
555 13th Street, N.W.
Washington, D.C. 20004
Telephone: (202) 383-5300

**Counsel of Record*

54 pp

QUESTIONS PRESENTED

1. In a racial gerrymandering case, is an inference drawn from the challenged district's shape and racial demographics, standing alone, sufficient to support summary judgment for the plaintiffs on the contested issue of the legislature's predominant motive in designing the district, when that inference is directly contradicted by the affidavits of the legislators who drew the district?

2. In applying the *Shaw-Miller* predominance test, may a court rely on isolated and sporadic party registration data to reject a state's assertion that partisan political considerations were the predominant factor in a district's design, when the uncontroverted evidence established that the state used *actual voting results*, rather than party registration data, to shape the district's boundaries?

3. May a plaintiff subject a majority-majority district with a substantial minority population to the strict scrutiny of the *Shaw-Miller* doctrine, simply by showing that it is slightly irregular in shape and contains a higher concentration of minority voters than its neighbors, when there is absolutely no *additional* evidence that race was the predominant factor in its design?

This page intentionally left blank.

LIST OF PARTIES

JAMES B. HUNT, JR., in his official capacity as Governor of the State of North Carolina, DENNIS WICKER in his official capacity as Lieutenant Governor of the State of North Carolina, HAROLD BRUBAKER in his official capacity as Speaker of the North Carolina House of Representatives, ELAINE MARSHALL in her official capacity as Secretary of the State of North Carolina, and LARRY LEAKE, S. KATHERINE BURNETTE, FAIGER BLACKWELL, DOROTHY PRESSER and JUNE YOUNGBLOOD in their capacity as the North Carolina State Board of Elections, are appellants in this case and were defendants below;

ALFRED SMALLWOOD, DAVID MOORE, WILLIAM M. HODGES, ROBERT L. DAVIS, JR., JAN VALDER, BARNEY OFFERMAN, VIRGINIA NEWELL, CHARLES LAMBETH and GEORGE SIMKINS are intervenor-appellants in this case and were intervenor-defendants below;

MARTIN CROMARTIE, THOMAS CHANDLER MUSE, R. O. EVERETT, J. H. FROELICH, JAMES RONALD LINVILLE, SUSAN HARDAWAY, ROBERT WEAVER and JOEL K. BOURNE are appellees in this case and were plaintiffs below.

This page intentionally left blank.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

LIST OF PARTIES iii

TABLE OF AUTHORITIES ix

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 2

A. THE 1997 REDISTRICTING PROCESS 2
B. THE 1997 PLAN 4
C. LEGAL CHALLENGES TO THE 1997 PLAN 7
D. THE THREE-JUDGE DISTRICT COURT'S OPINION .. 11
E. THE INTERIM PLAN 14

SUMMARY OF ARGUMENT 14

ARGUMENT 16

I. THE DISTRICT COURT'S JUDGMENT SHOULD BE REVERSED BECAUSE PLAINTIFFS FAILED TO CARRY THEIR BURDEN OF PROVING THAT RACE WAS THE PREDOMINANT FACTOR IN THE DESIGN OF DISTRICT 12. 16

A. THE DISTRICT COURT APPLIED AN IMPROPER EVIDENTIARY STANDARD IN GRANTING PLAINTIFFS SUMMARY JUDGMENT. 17

B. PLAINTIFFS FAILED TO SATISFY THE DEMANDING PREDOMINANCE STANDARD NECESSARY TO SUPPORT STRICT SCRUTINY. 18

1. Plaintiffs' Circumstantial Evidence Derived From The Shape And Demographics Of The District Was Inadequate To Establish The Predominant Use Of Race. 22

2. Defendants' Direct Evidence Clearly Established That Non-Racial Goals Were The Predominant Factor In The Design Of District 12. This Evidence Was Sufficient Not Only To Defeat Plaintiffs' Motion But To Obtain Summary Judgment For Defendants. 24

II. THE DISTRICT COURT WRONGLY DENIED THE STATE'S CROSS-MOTION FOR SUMMARY JUDGMENT BECAUSE THE STATE PRESENTED SUBSTANTIAL AND CREDIBLE EVIDENCE THAT DISTRICT 12'S SHAPE AND RACIAL DEMOGRAPHICS WERE THE RESULT OF LEGITIMATE, NON-RACIAL, POLITICAL MOTIVES. 28

A. THE STATE'S RELIANCE ON VOTING BEHAVIOR DOES NOT TRIGGER STRICT SCRUTINY. 30

B. THE DISPARITY BETWEEN PARTY REGISTRATION AND VOTING BEHAVIOR IN NORTH CAROLINA EXPLAINS THE SHAPE AND RACIAL DEMOGRAPHICS OF DISTRICT 12. 31

C. TO DETERMINE THE LEGISLATURE'S PREDOMINANT MOTIVATION IN DESIGNING A DISTRICT THE COURT MUST CONSIDER THE DISTRICT AS A WHOLE. 34

III. APPLICATION OF STRICT SCRUTINY TO DISTRICT 12 IS UNWARRANTED BECAUSE IT DOES NOT GIVE RISE TO THE KINDS OF HARMS WITH WHICH THE *SHAW-MILLER* DOCTRINE IS CONCERNED. 38

CONCLUSION 44

[This page intentionally left blank.]

TABLE OF AUTHORITIES

CASES

Abrams v. Johnson, 521 U.S. 74 (1997) 6

Anderson v. Liberty Lobby, Inc.,
477 U.S. 242 (1986) 17, 19, 26

Baker v. Carr, 369 U.S. 186 (1962) 37

Borden, Inc. v. Spoor, Behrins, Campbell, Young, Inc.,
828 F. Supp. 216 (S.D.N.Y. 1993) 26

Burns v. Richardson, 384 U.S. 73 (1966) 25

Bush v. Vera, 517 U.S. 952 (1996) ..... *passim*

Celotex Corp. v. Catrett, 477 U.S. 317 (1986) 17, 18

Davis v. Bandemer, 478 U.S. 109 (1986) 35

DeWitt v. Wilson, 515 U.S. 1170 (1995),
summarily aff'g, 856 F. Supp. 1409 (E.D. Ca. 1994) .. 40

Edwards v. Aguillard, 482 U.S. 578 (1986) 22, 43

Gaffney v. Cummings, 412 U.S. 735 (1973) 24, 42

Illinois v. Krull, 480 U.S. 340 (1987) 26

Johnson v. Miller, 922 F. Supp. 1556 (S.D. Ga. 1995),
aff'd, 521 U.S. 74 (1997) 4, 6

Johnson v. Mortham, 915 F. Supp. 1529 (N.D. Fla. 1995) 27

Joint Anti-Fascist Refugee Comm. v. Mc Grath, 341 U.S. 123 (1951) 26

Karcher v. Daggett, 462 U.S. 725 (1983) 25

Lawyer v. Department of Justice, 521 U.S. 567, 117 S. Ct. 2186 (1997) 20, 43

McDonald v. Board of Election Comm'rs of Chicago, 394 U.S. 802 (1969) 26

Miller v. Johnson, 515 U.S. 900 (1995) ..... *passim*

Mueller v. Allen, 463 U.S. 388 (1983) 26

Nunez v. Superior Oil Co., 572 F.2d 1119 (CA5 1978) .. 26

Price Waterhouse v. Hopkins, 490 U.S. 228 (1989) 43

Rostker v. Goldberg, 453 U.S. 57 (1981) 26

Shaw v. Hunt (Shaw II), 517 U.S. 899 (1996) 2, 20, 21

Shaw v. Reno (Shaw I), 509 U.S. 630 (1993) . 19, 38, 39, 40

Starceski v. Westinghouse Elec. Corp., 54 F.3d 1089 (CA3 1995) 43

Thornburg v. Gingles, 478 U.S. 30 (1986) 36

United States v. Hays, 515 U.S. 737 (1995) 39

Vera v. Bush, 933 F. Supp. 1341 (S.D. Tex. 1996) 4

White v. Weiser, 412 U.S. 783 (1973) 25

Wightman v. Springfield Terminal Ry. Co., 100 F.3d. 228 (CA1 1996) 18

STATUTES

28 U.S.C. § 1253 1

MISCELLANEOUS

11 JAMES WM. MOORE, ET AL., MOORE'S FEDERAL PRACTICE § 56.03[4] 17

11 JAMES WM. MOORE, ET AL., MOORE'S FEDERAL PRACTICE § 56.10[6] 18

11 JAMES WM. MOORE, ET AL., MOORE'S FEDERAL PRACTICE § 56.11[1][b] 17

[This page intentionally left blank.]

STATE APPELLANTS' BRIEF ON THE MERITS

Governor James B. Hunt, Jr., and the other state defendants below appeal from the final judgment of the three-judge United States District Court for the Eastern District of North Carolina, dated April 6, 1998, which declared District 12 in the congressional redistricting plan enacted by the North Carolina General Assembly on March 31, 1997, unconstitutional and permanently enjoined defendants from conducting any elections under that plan.

OPINIONS BELOW

The April 14, 1998 opinion of the three-judge district court, which has not yet been reported, appears at JS at 1a.[1]

JURISDICTION

The district court's judgment was entered on April 6, 1998. On April 8, 1998, defendants filed an amended notice of appeal to this Court. Jurisdiction of this Court on appeal is invoked under 28 U.S.C. § 1253.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This appeal involves the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States and Rule 56 of the Federal Rules of Civil Procedure, Summary Judgment. *See* JS at 169a & 171a-173a.

---

[1] References to "JS" are to the Appendix of the Jurisdictional Statement; references to "JA" are to the Joint Appendix.

STATEMENT OF THE CASE

A. THE 1997 REDISTRICTING PROCESS

In *Shaw v. Hunt* (*Shaw II*), 517 U.S. 899 (1996), this Court held that District 12 in North Carolina's 1992 congressional redistricting plan ("the 1992 plan") violated the Equal Protection Clause because race predominated in its design and it could not survive strict scrutiny. The matter was remanded to the district court for an appropriate remedy. On remand, the district court afforded the state legislature an opportunity to redraw the state's congressional plan to correct the constitutional defects found by this Court. The General Assembly established Senate and House redistricting committees to carry out this task. Senator Roy A. Cooper, III, a Democrat, was appointed Chairman of the Senate Committee and Representative Edwin McMahan, a Republican, was appointed Chairman of the House Committee. JS at 70a, 80a. Like the majority of members on the committees, neither Senator Cooper nor Representative McMahan had served on the committee that drafted the 1992 plan.[2]

In consultation with the legislative leadership, the committees determined that, to pass both the Democratic-controlled Senate and the Republican-controlled House, the new plan needed to maintain the existing partisan balance in the state's congressional delegation (a six-six split between Democrats and Republicans). Because party registration is not

[2] Only 11 of the 41 legislators appointed to these committees had served on the redistricting committees that drafted the 1992 plan. *See* Bartlett Aff. (CD 47), Vol. I Commentary at 5.

a reliable predictor of voting behavior, the committees used the actual votes cast in a series of elections between 1988 and 1996 to craft Democratic and Republican districts.[3] These election results were the principle factor that guided the committees in configuring the plan and in placing precincts within the districts. JS at 71a, 73a, 77a, 80a-81a, 81-82a.

In designing the plan, the committees sought to comply with the requirements of the Voting Rights Act, as well as the constitutional requirement of population equality. JS at 73a-77a, 82a-83a; JA at 63a. Well aware of their responsibilities under this Court's decision in *Shaw* and its progeny, however, the committees ensured that racial considerations did not predominate over race-neutral districting criteria. To this end, the new plan was designed: (1) to avoid dividing precincts; (2) to avoid dividing counties when reasonably possible;[4] (3) to

[3] The computerized data base the committees used to draw the plan included the total number of people in each precinct who voted for each major candidate in the 1988 Court of Appeals election, the 1988 Lieutenant Governor election, and the 1990 United States Senate election. *See* JA at 101-110. In addition, both the Senate and House committees used precinct-by-precinct election results for a series of statewide elections between 1990 and 1996 to draw the plan. JS at 73a, 81a.

[4] In North Carolina, as in most of the southeastern states, it is virtually impossible to design a congressional map that does not split any of the State's 100 counties, given the constitutional mandate of population equality and other legitimate districting concerns. Indeed, all of the southeastern states currently include multiple county divisions in their congressional plans, and in Florida's congressional plan 26 of 67 counties (38.8%) are divided. JS at 109a-110a, 115a-116a. For this reason, the committees chose to avoid dividing counties only to the extent reasonably possible.

eliminate cross-overs, double cross-overs, and other artificial means of maintaining contiguity; (4) to group together citizens with similar needs and interests; and (5) to ensure ease of communication between voters and their representatives. JS at 72a, 81a, 63a-64a. The committees did not utilize shape or mathematical compactness measures in constructing the plan.

The committees' strategy proved successful. On March 31, 1997, the North Carolina legislature enacted a new congressional redistricting plan, 1997 Session Laws, Chapter 11 ("the 1997 plan"), the redistricting law at issue in this case.[5] The plan was a bipartisan one, endorsed by the leadership of both parties in both houses. *See* JS at 77a, 82a-83a, 64a. However, twelve of the seventeen African-American members of the House voted against the plan because they believed it did not adequately take into account the interests of the State's African-American residents. *See* JS at 83a.

B. THE 1997 PLAN

The 1997 plan creates six "Democratic" districts and six "Republican" districts. These districts preserve the partisan cores of their 1992 predecessors, yet their lines are significantly different: they reassign more than 25% of the State's

[5] In this respect, the North Carolina legislature succeeded where other similarly-situated state legislatures have not. *See, e.g., Johnson v. Miller*, 922 F. Supp. 1556, 1559 (S.D. Ga. 1995), *aff'd*, 521 U.S. 74 (1997) (on remand from this Court's decision in *Miller v. Johnson*, 515 U.S. 900 (1995)) (legislature abdicated its redistricting responsibilities to federal district court); *Vera v. Bush*, 933 F. Supp. 1341, 1342 (S.D. Tex. 1996) (on remand from this Court's decision in *Bush v. Vera*, 517 U.S. 952 (1996) (same).

population and nearly 25% of its geographic area. The most dramatic changes are in District 12, which contains less than 70% of its original population and only 41.6% of its original geographic area. JS at 130a-132a, 153a, 155a.

The 1997 plan respects the traditional race-neutral districting criteria identified by the legislature. In particular, District 12 divides only one precinct (a precinct that is divided in all local districting plans as well); it includes parts of only six counties; and it achieves contiguity without relying on artificial devices like cross-overs and double cross-overs.[6] It creates a district joining together citizens with similar needs and interests in the urban and industrialized areas along the interstate highways that connect Charlotte and the Piedmont Urban Triad, areas in which the bulk of the State's recent population growth has occurred. JS at 63a-67a, 73a-74a, 82a, Stuart Aff. (CD 47), Rpt. at 9-10. Of the 12 districts in the 1997 plan, it has the third shortest travel time (1.67 hours) and the third shortest distance (95 miles) between its farthest points, making it "highly accessible" for a congressional representative.[7] JS at 105a. Moreover, because District 12 is built around major transportation corridors, it functions effectively

[6] In contrast, District 12 in the 1992 plan divided 48 precincts; included parts of 10 counties; and achieved contiguity only by heavy reliance on artificial devices like cross-overs and double cross-overs. *See* JS at 63a.

[7] In contrast, District 12 in the 1992 plan had a travel time of 2.97 hours and a travel distance of 162.4 miles between its farthest points, ranking it in the bottom one-third of North Carolina's 12 districts based on time and distance. *See* JS at 105a-106a.

for representatives and for constituents.[8] Mathematical measures of geographic compactness were not among the criteria adopted by the legislature in designing the new plan. Even so, District 12's geographic compactness is significantly improved over the 1992 plan, though it remains relatively low.[9]

Seventy-five (75%) percent of District 12's registered voters are Democrats. More importantly, at least 62% of the district's registered voters voted for the Democratic candidate in the 1988 Court of Appeals election, the 1988 Lieutenant Governor election, and the 1990 United States Senate election. JS at 99a.

District 12 is not a majority-minority district by any measure: only 46.67% of its total population, 43.36% of its voting age population, and 46% of its registered voter

---

[8] *See* Webster Report, JS at 124a-130a, 134a (noting that District 12's "focus upon major transportation corridors" makes its travel time compactness substantially better than that of many districts that score higher under mathematical measures of compactness). District 12 is similar in concept to Georgia's new Eleventh Congressional District, drawn by a three-judge district court when the Georgia legislature could not agree on a new plan in the wake of this Court's 1995 decision in *Miller*. The Eleventh District stretches from suburban Atlanta to the North Carolina and Tennessee borders, connecting parts of 13 different counties and splitting six of them. Because the district is built around the "connecting cable" of Interstate 85, however, and has a distinct "urban/suburban flavor," its residents have "a palpable community of interests." *Johnson v. Miller*, 922 F. Supp. at 1564. In *Abrams v. Johnson*, 521 U.S. 74 (1997), this Court upheld the Eleventh District as drawn.

[9] District 12's dispersion compactness measure in the 1997 plan is 142% improved over the 1992 plan and its perimeter compactness measure is 193% improved. *See* JS at 127a -128a, 143a-146a.

population is African-American.[10] Race was not a dominant or controlling factor in the development or enactment of the plan. JS at 77a, 83a, 87a-88a. Partisan voting patterns, not race, were the predominant basis for assigning voters to the district.[11] *See* JS at 66a-67a, 77a, 82a-83a, 99a.

Because 40 of North Carolina's 100 counties are subject to the preclearance requirements of Section 5 of the Voting Rights Act, the legislature submitted the 1997 plan to the United States Department of Justice for preclearance. The Department precleared the plan on June 9, 1997.

C. Legal Challenges To The 1997 Plan

Equal protection challenges to the 1997 plan were first raised in the remedial phase of the *Shaw* litigation, when the State submitted the plan to the three-judge court to determine whether it cured the constitutional defects in the earlier plan. Two of the plaintiffs who challenge the 1997 plan in the instant

---

[10] In contrast, 56.63% of the total population, 53.34% of the voting age population, and 53.54% of the registered voter population of District 12 in the 1992 plan was African-American. *See* JA at 111-117.

[11] District 1 is another of the six "Democratic" districts established by the 1997 plan. Unlike District 12, District 1 is a majority-minority district by one measure: 50.27% of its total population is African-American. Like District 12, District 1 respects the traditional race-neutral redistricting criteria identified by the legislature. It contains no divided precincts, divides only 10 counties and achieves contiguity without relying on artificial devices like cross-overs and double cross-overs. It creates a district joining together citizens in the mostly rural and economically depressed counties in the State's northern and central Coastal Plain. *See* JS at 63a-67a, 73a-74a, 82a, JA at 101-105, Goldfield Aff. (CD 47), Rpt. at 8-12.

case - Martin Cromartie and Thomas Chandler Muse - participated as parties plaintiff in that remedial proceeding. So did Robinson Everett, who was both a named plaintiff and the plaintiffs' attorney in the *Shaw* case.

In that remedial proceeding, Everett and his co-plaintiffs ("the *Shaw* plaintiffs") were given an opportunity to litigate any constitutional challenges they might have to the 1997 plan, which the State had enacted under the *Shaw* court's injunction. They elected not to avail themselves of that opportunity.

Exercising its authority to review the State's proposed remedial plan, the court ruled that the plan was "in conformity with constitutional requirements" and that it was an adequate remedy for the constitutional defects in the prior plan "as to the plaintiffs and plaintiff-intervenors in this case." JS at 167a, 160a. On that basis, the court entered an order approving the plan and authorizing the state defendants to proceed with congressional elections under it. Everett and his co-plaintiffs took no appeal from that order.

Having forgone an opportunity to litigate their constitutional challenges to the 1997 plan before the three-judge court in *Shaw*, Everett and his co-plaintiffs sought to have those same claims adjudicated by a different three-judge court. They did so by amending a complaint in a separate lawsuit they had previously filed against the same defendants. In that amended complaint, Cromartie, Muse, and four persons who had not been named as plaintiffs in *Shaw* ("the *Cromartie* plaintiffs") - all represented by Everett - asserted racial

gerrymandering challenges to Districts 1 and 12 in the 1997 plan.[12]

On January 15, 1998, the *Cromartie* case was assigned to a three-judge panel. On January 30, 1998, four days before the close of the candidate filing period, the *Cromartie* plaintiffs moved for a preliminary injunction halting all further elections under the 1997 plan. Several days later, they also moved for summary judgment. The state defendants filed a cross-motion for summary judgment. On March 23, 1998, the last day on which the parties were allowed to file materials in support of the motions for summary judgment, the *Cromartie* plaintiffs filed their expert witness affidavits and various statistical

---

[12] In their Jurisdictional Statement, the state defendants challenged the district court's ruling that the final judgment entered by the district court on remand from this Court's decision in *Shaw II* - a judgment which found the 1997 plan constitutional and authorized the State to proceed with elections under it - did not preclude the constitutional challenges to that very plan that are being asserted in this parallel proceeding. The state defendants continue to believe that the District 12 claims asserted in this case are barred by that final judgment because they are asserted by persons who must - in fairness - be considered "privies" of at least one of the named plaintiffs in *Shaw*, Robinson Everett. Because the policies behind the doctrine of claim preclusion are at their most compelling when the claims in question seek to enjoin a state's electoral processes, and the entry of two dramatically inconsistent judgments against a state in parallel litigation involving such closely affiliated plaintiffs is an affront to the integrity of the federal judicial system, this Court should craft a rule of privity that would bar these claims. The state defendants recognize that the record, as it now stands, may be insufficient to permit this Court to undertake that task. Accordingly, they have elected not to press that argument further on this appeal, but to save it for remand, should this Court deem a remand necessary for other reasons.

information, including maps showing partisan registration by precinct in portions of District 12.[13]

Eight days later, before either party had conducted any discovery and without an evidentiary hearing, the three-judge court heard brief oral arguments on the pending motions for preliminary injunction and summary judgment. Three days after that, on April 3, 1998, the court, with Circuit Judge Sam J. Ervin, III dissenting, granted the *Cromartie* plaintiffs' motion for summary judgment, declared District 12 in the 1997 plan unconstitutional, and permanently enjoined the state defendants from conducting any primary or general elections under the 1997 plan. JS at 45a. The court's order did not explain the basis for its decision, stating only that "[m]emoranda with reference to [the] order will be issued as soon as possible."[14] JS at 46a.

---

[13] Prior to that point, plaintiffs only had filed several incompetent affidavits of laypersons with no personal knowledge about the redistricting process. *See* JA at 47-83 and at 137-155. Had they been afforded an adequate opportunity to respond to plaintiffs' eleventh hour showing, defendants could have cleared up the court's misunderstanding of plaintiffs' irrelevant registration data (that the redistricting committees had not used in fashioning the 1997 plan) with the more probative election results (that the committees in fact relied upon). *See* Argument II, *infra*.

[14] The state defendants immediately noticed an appeal to this Court. Since the elections process under the 1997 plan was already underway and the primary election only a few weeks away, they asked the district court to stay its April 3rd order pending disposition of that appeal. When it refused to do so, the state defendants made application to Chief Justice Rehnquist for a stay of the same order. The Chief Justice referred that application to the full Court, which denied it on April 13, 1998. When this Court denied the stay application, the district court had yet to issue its opinion explaining its order and permanent injunction.

D. The Three-Judge District Court's Opinion

On April 14, 1998, the three-judge court issued an opinion explaining the basis for its order and injunction of April 3, 1998. JS at 1a-44a. The court held that the *Cromartie* plaintiffs were entitled to summary judgment on their challenge to District 12, because the "uncontroverted material facts" established that the legislature had "utilized race as the predominant factor in drawing the District."[15] JS at 21a-22a. Unlike the lower courts whose "predominance" findings this Court upheld in *Miller*, *Bush*, and *Shaw II*, the court below did not base its finding on any *direct* evidence of legislative motivation; instead, it predicated its ruling of constitutional invalidity entirely on an inference drawn from the district's shape and racial demographics. JS at 19a-22a.

The court reasoned that District 12 was "unusually shaped," that it was "still the most geographically scattered" of North Carolina's twelve congressional districts, that its dispersion and perimeter compactness measures were lower than the mean for the twelve districts in the plan, that it "include[s] nearly all of the precincts with African-American population proportions of over forty percent which lie between Charlotte and Greensboro," and that when it splits cities and counties, it does so "along racial lines." The court concluded that these so-called "facts," established - as a matter of law - that the legislature had

---

[15] The court also held that the Cromartie plaintiffs were *not* entitled to summary judgment on their challenge to District 1, the only majority-minority district in the 1997 plan. JS at 22a-23a.

"disregarded traditional districting criteria" and "utilized race as the predominant factor" in designing District 12." JS at 20a-22a.

Although the court acknowledged that the state defendants had produced evidence that partisan political preference, rather than race, was the predominant factor in the design of District 12, it chose not to credit this evidence because "the legislators excluded many heavily-Democratic precincts from District 12, even though those precincts immediately border the District."[16] JS at 20a.

Judge Ervin dissented. At the outset, he noted that the plaintiffs in this case - unlike those in *Miller*, *Bush*, and *Shaw II* - had presented no *direct* evidence that the legislature was motivated predominantly by racial considerations in designing District 12, but relied solely on an inference they claimed could be drawn from the district's shape and racial demographics. JS at 26a-29a. He found this inference decidedly weaker than those in the Court's prior cases, because District 12 was not a majority-minority district, it had not been drawn to comply with the Department of Justice's invalid "black maximization" policy, and its shape was "not so bizarre or unusual . . . that it cannot be explained by factors other than race."JS at 25a-26a, 30a-35a.

---

[16] In reaching this conclusion, the court relied entirely on maps offered by plaintiffs showing the Democratic *registration* of precincts in Guilford, Forsyth and Mecklenburg Counties. JS at 8a-9a. (citing McGee Aff. (CD 61), Exhibits N, O and P). The uncontested evidence presented by the State, however, indicated that the legislature used election results, not party registration, to measure the partisan nature of the districts. JS at 73a, 81a.

In addition, Judge Ervin noted, the state defendants had rebutted the *Cromartie* plaintiffs' circumstantial evidence with "convincing" evidence that partisan political preference, rather than race, had been the predominant factor in drawing the district.[17] JS at 25a-26a, 34a-36a. According to Judge Ervin, the case law required the court to accept this evidence as true.[18] JS at 27a.

---

[17] In addition to presenting affidavits from the legislators who drew the plan, the state defendants presented the expert statistical evidence of Dr. David W. Peterson. Dr. Peterson conducted a comprehensive statistical analysis of the correlation between District 12's boundary and the race, party affiliation, and political voting patterns of the voters in the precincts that touch along the inside and outside of that boundary. He concluded that the boundary's path "can be attributed to political considerations with at least as much statistical certainty as it can be attributed to racial considerations," that the statistical evidence "support[s] the proposition that creation of a Democratic majority in District Twelve was a more important consideration in its construction than was the creation of a black majority," and that "there is no statistical indication that race was the predominant factor determining the border." *See* JS at 87a-88a, 99a.

[18] As Judge Ervin correctly observed, the *Cromartie* plaintiffs' evidence that District 12 excluded certain precincts with a large number of registered Democrats did not undermine the credibility of this evidence, for several reasons. First, it consisted not of a comprehensive examination of the district's entire circumference, but of selective examples. Second, it ignored the fact that the legislators who drew the plan said they used *actual election results*, rather than party registration figures, to construct the district's lines in recognition of the fact "that voters often do not vote in accordance with their registered party affiliation." JS at 33a-36a. Indeed, he found the evidence that race had predominated in the design of District 12 so weak that he would have entered summary judgment *against* the *Cromartie* plaintiffs on that claim. JS at 43a-44a.

E. THE INTERIM PLAN

The district court allowed the General Assembly 30 days to redraw the state's congressional redistricting plan to correct the defects it had found in the 1997 plan. On May 21, 1998, the General Assembly enacted an interim congressional redistricting plan, 1998 Session Laws, ch. 2 ("the Interim Plan"), and submitted it to the district court for approval. The Interim Plan specifically provides that it is effective for the 1998 and 2000 elections only if this Court fails to reverse the district court decision holding the 1997 plan unconstitutional. The Department of Justice precleared the Interim Plan on June 8, 1998. On June 22, 1998, the district court entered an order tentatively approving the Interim Plan and authorizing the State to proceed with the 1998 elections under it.[19] JS at 175a-180a.

SUMMARY OF ARGUMENT

The judgment below is riddled with errors; it cannot stand. Initially, in holding that plaintiffs were entitled to summary judgment on their District 12 claim, the district court committed three critical errors. First, the court improperly required the state defendants to bear the burden of persuasion at summary judgment, when this Court's cases make clear that burden lies with the plaintiffs. Second, the court found the predominance standard satisfied by evidence falling far short of that which this Court has previously found sufficient to impugn the considered choices of a state legislature. Third, the

[19] On July 17, 1998, plaintiffs noticed an appeal from that order. This Court has yet to act on that appeal.

court failed to accord the testimony of state legislators a presumption of truthfulness and engaged instead in unfounded second-guessing of their motivations, which this Court's precedents forbid it to do. Each of these errors independently provides sufficient basis for reversing the lower court's entry of summary judgment for the plaintiffs.

The uncontroverted evidence in the summary judgment record established that the legislature designed the districting plan as a whole, and District 12 in particular, to preserve the existing partisan balance in the State's congressional delegation, and that it used actual election results, not voter registration data, to accomplish this purpose. In denying the defendants' motion for summary judgment, the district court made at least two critical errors. First, it relied on voter registration data, which the legislature did not use in designing District 12. Second, it relied on limited information about a handful of isolated precincts rather than carefully and fully examining the design of the district as a whole. Had the district court not made these errors, but correctly applied the law to the uncontroverted facts before it, it would have been compelled to enter summary judgment for the defendants.

North Carolina's District 12 is a majority-majority district with a substantial minority population. Its boundaries were drawn on the basis of actual voting patterns in order to create a plan that would preserve the existing partisan balance in the State's congressional delegation. Such a district, even if somewhat oddly shaped, does not give rise to any of the harms with which the *Shaw* doctrine is concerned. Because applying the strict scrutiny of *Shaw* to such a district represents a

substantial - and indefensible - extension of this Court's case law, the district court's decision must be reversed.

ARGUMENT

I. THE DISTRICT COURT'S JUDGMENT SHOULD BE REVERSED BECAUSE PLAINTIFFS FAILED TO CARRY THEIR BURDEN OF PROVING THAT RACE WAS THE PREDOMINANT FACTOR IN THE DESIGN OF DISTRICT 12.

In concluding that the defendants' stated purposes for drawing the boundaries of District 12 were false, and that race was instead the predominant motivating factor, the district court committed at least three manifest errors. First, the court improperly required the state defendants to bear the burden of persuasion at summary judgment, when this Court's precedents make clear that burden lies with the plaintiffs. Second, the court found the *Miller* predominance standard satisfied on a significantly lower evidentiary showing than this Court has required in previous redistricting cases. Third, the court failed to accord the State's testimony a presumption of truthfulness, a presumption mandated by this Court's precedents. In light of these fatal deficiencies, the district court's grant of summary judgment to plaintiffs should be overturned.

A. THE DISTRICT COURT APPLIED AN IMPROPER EVIDENTIARY STANDARD IN GRANTING PLAINTIFFS' SUMMARY JUDGMENT.

A motion for summary judgment must be resolved by reference to the evidentiary burdens that would apply at trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250-54 (1986). When a party seeks summary judgment on an issue on which he will have the burden of persuasion at trial, he is entitled to prevail only if the evidence in the summary judgment record is such that no reasonable fact finder hearing that evidence could fail to find for him on that issue.[20] *See id.* at 252-55. In other words, the movant's evidence, viewed in the light most favorable to his opponent, must be "so one-sided" that he would be entitled to judgment as a matter of law at trial. *See id.* at 249-52 (explaining that the summary judgment standard "mirrors" the Rule 50(a) standard for a directed verdict at trial). Under this stringent standard, a party who has the burden of persuasion at trial is seldom entitled to summary judgment in his favor. *See* 11 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 56.03[4], at 56-37 through 56-38 & n.54; *id.* § 56.11[1][b], at 56-90 through 56-91 (3d ed. 1997).

In this case, the burden of persuasion at trial for proving that race was the predominant factor in the design of District 12

---

[20] By contrast, a party who will *not* have the burden of persuasion at trial may obtain summary judgment simply by showing that his opponent has insufficient evidence to permit a reasonable finder of fact to return a verdict in his favor. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 324-26 (1986).

clearly rested with the plaintiffs. *See Miller v. Johnson*, 515 U.S. 900, 916 (1995) (the plaintiff bears the burden of proving the race-based motive). The district court ignored this allocation of the burden of proof in concluding that the plaintiffs were entitled to summary judgment. Indeed, a careful reading of the court's opinion makes clear that despite the court's assertions, it analyzed plaintiffs' motion under the standard that applies to parties who will *not* have the burden of persuasion at trial.[21] *See* JS at 21a (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986)). On this basis alone, the court's decision should be overturned.

B. PLAINTIFFS FAILED TO SATISFY THE DEMANDING PREDOMINANCE STANDARD NECESSARY TO SUPPORT STRICT SCRUTINY.

In addition to misallocating the burden of persuasion, the district court failed to require a sufficient evidentiary showing that race - and not neutral redistricting criteria - was the predominant factor motivating the State's redistricting plan. Had the district court applied the proper standard, it could not

---

[21] That the court also had before it the state defendants' cross-motion for summary judgment should have had no bearing on its analysis of the plaintiffs' motion. *See* 11 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 56.10[6] (3d ed. 1997) (cross-motions for summary judgment must be evaluated independently, according to the usual summary judgment standard, and the denial of one does not imply the grant of the other); *Wightman v. Springfield Terminal Ry. Co.*, 100 F.3d. 228, 230 (CA1 1996) (cross-motions for summary judgment do not alter basic Rule 56 standard, nor do they necessarily warrant the grant of summary judgment to either party).

have justified a grant of summary judgment. *See Anderson*, 477 U.S. at 252-55.

In *Shaw I*, this Court first recognized that a facially race-neutral electoral districting plan could, in certain exceptional circumstances, be a "racial classification" subject to strict scrutiny under the equal protection clause. *Shaw v. Reno* (*Shaw I*), 509 U.S. 630, 642-44, 646-47, 649 (1993). Two years later, in *Miller*, this Court established a narrow condition for the application of strict scrutiny: compelling evidence "that *race for its own sake*, and not other districting principles, was the legislature's *dominant and controlling rationale* in drawing its district lines." 515 U.S. at 913 (emphasis added). To satisfy this standard at the summary judgment stage, a plaintiff must prove that the evidence, viewed in the light most favorable to the defendant, demonstrates that the legislature "subordinated traditional race-neutral districting principles . . . to racial considerations," such that race was "the predominant factor" in the design of the districts. *Id.* at 916.

In *Miller*, this Court recognized that "[f]ederal court review of districting legislation represents a serious intrusion on the most vital of local functions," that redistricting legislatures are almost always aware of racial demographics, and that the "distinction between being aware of racial considerations and being motivated by them" is often difficult to draw. 515 U.S. at 915-16. For these reasons, this Court directed the lower courts to "exercise extraordinary caution" in applying the predominance test. *Id.* at 916; *see id.* at 928-29 (O'Connor, J., concurring) (stressing that the *Miller* standard is a "demanding"

one, which subjects only "extreme instances of [racial] gerrymandering" to strict scrutiny).

In its various opinions in *Bush*, this Court made clear that neither proof the legislature considered race as a factor in drawing district lines nor evidence the legislature neglected traditional districting criteria is sufficient to trigger strict scrutiny. *Bush v. Vera*, 517 U.S. 952, 958, 962 (1996) (plur. op.). Instead, strict scrutiny applies only when the plaintiff establishes *both* that (1) the State *substantially* neglected traditional districting criteria in drawing district lines, *and* (2) that it did so *predominantly* because of racial considerations.[22] *Id.* at 962-63 (plur. op.); *id.* at 993-94 (O'Connor, J., concurring).

In this case, plaintiffs clearly failed to meet their evidentiary burden. A comparison of the evidence proffered in the Court's prior cases with that offered by the plaintiffs in this case bolsters this conclusion. For instance, before applying strict scrutiny and overturning Texas' redistricting plan in *Bush*, a plurality of the Court found not only that Texas' district was irregular in shape, but also that there was "substantial *direct* evidence of the legislature's racial motivations." 517 U.S. at 960 (emphasis added). This evidence included the state's preclearance report to the Justice Department, which

[22] Since *Bush*, this Court has twice applied this same formulation of the threshold test for strict scrutiny. *See Lawyer v. Department of Justice*, 521 U.S. 567, __, 117 S. Ct. 2186, 2194-95 (1997) (finding standard not satisfied); *Shaw v. Hunt*, (*Shaw II*), 517 U.S. 899, 906-07 (1996) (finding standard satisfied).

"report[ed] a consensus within the legislature that the three new congressional districts 'should be configured in such a way as to allow members of racial, ethnic, and language minorities to elect Congressional representatives.'" *Id.* Because of this goal, the report acknowledged, three majority-minority districts were created. *See id.* at 960-61. In addition, the plurality found that Texas legislators had used an unprecedented computer program that "permitted redistricters to manipulate district lines on computer maps," making "more intricate refinements on the basis of race than on the basis of other demographic information." *Id.* at 961-62. Taken together,[23] the plurality held, these findings justified the application of strict scrutiny.[24]

Likewise, in *Miller* and *Shaw II*, the Court applied strict scrutiny only after finding that the districts' bizarre geographic shapes, *coupled with* the state defendants' admissions that they had intentionally set out to create majority-minority districts, established that race was the predominant factor in the design of those districts. *See Miller*, 515 U.S. at 917-18 (citing Georgia's admission that it "would not have added those portions of" the counties "but for the need to include additional black population in that district"); *Shaw II*, 517 U.S. at 906 (citing the State's preclearance submission, which

[23] Notably, the Court emphasized that it was not holding that "any one of these factors is independently sufficient to require strict scrutiny." *Bush*, 517 U.S. at 962.

[24] Justices Thomas and Scalia, who joined in the judgment, held that the state's admission that it intentionally created majority-minority districts was sufficient to justify strict scrutiny. *See id.* at 1002. No such admission has been made in this case.

acknowledged that the district's "*overriding* purpose" was to create two majority-minority districts). No such evidence is present in this case.

1. Plaintiffs' Circumstantial Evidence Derived From The Shape And Demographics Of The District Was Inadequate To Establish The Predominant Use Of Race.

In this case, the *only* evidence in the record that could even remotely support the plaintiffs' assertion of a predominantly racial motive in District 12's design was an inference the plaintiffs asked the court to draw from the district's shape and racial demographics.[25] This evidence was legally insufficient to sustain plaintiffs' burden on summary judgment. While District 12 is admittedly less compact than the State's other districts, it covers a significantly smaller radius than the State's earlier plan, is contiguous and roughly equal throughout in length, and it does not rely on artificial devices such as cross-overs and double cross-overs to achieve that contiguity. *See* JS at 36a (Ervin, J., dissenting) (citing Affidavit of Dr. Gerald R. Webster). Of the 12 districts in the 1997 plan, it "has the third

[25] Plaintiffs presented various maps and demographic data, as well as the affidavits of several experts who relied on the same evidence of shape and racial demographics to opine that race was the predominant factor used by the State to draw the boundaries of the congressional districts. *See, e.g.*, Declaration of Dr. Ronald E. Weber JA at 219-20. But as this Court has explained in another context, "the postenactment testimony of outside experts is of little use" in determining the legislature's purpose in enacting a particular statute, when none of those experts "participated in or contributed to the enactment of the law or its implementation." *Edwards v. Aguillard*, 482 U.S. 578, 595-96 (1986).

shortest travel time (1.67 hours) and the third shortest distance (95 miles) between its farthest points." JS at 105a.

Equally as important, unlike in *Bush*, *Miller* or *Shaw II*, the record itself is devoid of any support for plaintiffs' assertion that race was the overarching motivation for the district's design. District 12 was not the product of the Department of Justice's invalid "black maximization" policy. There were no concessions of racial motivations by the state defendants; there were no race-based admissions in the myriad of indicators traditionally used to glean legislative intent - the plain language of the legislation, the committee hearings, the committee reports, the floor debates, the State's § 5 submissions - and there were no acknowledgments in the post-enactment statements of those who participated in the drafting or enactment of the plan that race was a motivating factor. *See* JS at 33a (Ervin, J., dissenting) ("Plaintiffs' have proffered neither direct nor circumstantial evidence that the General Assembly was pressured by the Department of Justice to maximize minority participation when it redrew the congressional districts in 1997."). Because plaintiffs' showing that race was the predominant factor in the design of District 12 was deficient, they were not entitled to summary judgment.

2. Defendants' Direct Evidence Clearly Established That Non-Racial Goals Were The Predominant Factor In The Design Of District 12. This Evidence Was Sufficient Not Only To Defeat Plaintiffs' Motion But To Obtain Summary Judgment For Defendants.

Far from supporting plaintiffs' position, the record contains substantial evidence that race was anything but a predominant factor in the design of District 12. The district court's decision thus warrants reversal not only because it sided improperly with plaintiffs but because it should have granted defendants' cross-motion for summary judgment.

The North Carolina legislature, exercising the state's right to design its own congressional districts, selected a number of traditional - and race-neutral - districting criteria to be used in constructing the 1997 plan: contiguity, respect for political subdivisions, respect for voters' needs and interests, preservation of the partisan balance in the State's congressional delegation, avoidance of contests between incumbents, and, to the extent possible while curing the constitutional defects in the prior plan, preservation of the cores of prior districts. JS at 73a-74a, 81a. The Court previously has found use of such districting criteria entirely legitimate.[26]

---

[26] This Court has held that a state may draw district lines to allocate seats proportionately to major political parties. *See Gaffney v. Cummings*, 412 U.S. 735, 751-54 (1973); *see also Bush*, 517 U.S. at 963-64, (opinion of O'Connor, J., joined by Rehnquist, C.J. and Kennedy, J). This Court also has held that both preserving the cores of prior districts and avoiding contests between incumbents are legitimate state districting goals. *See*

The State's lawful, non-racial motivations were confirmed by affidavits from the legislators who headed the legislative committees that drew the 1997 plan and shepherded it through the General Assembly. These legislators testified under oath that they and their colleagues were well aware, when they designed and enacted the 1997 plan, of the constitutional limitations imposed by this Court's decisions in *Shaw* and its progeny, and that they therefore took pains to ensure that race was not the predominant - or even a significant - factor in the design of any of its districts. Rather, the legislature's overarching goal was preservation of the six-to-six Democratic and Republican electoral balance. Maintenance of the existing electoral balance was essential to gain passage of any new redistricting plan since the Senate was Democratic-controlled and the House was dominated by Republicans. *See* JS at 70a-72a, 81a. As Senator Cooper stated, "I knew that any plan which gave an advantage to Democrats faced certain defeat in the House while any plan which gave an advantage to Republicans faced certain defeat in the Senate." JS at 73a. "Preserving the existing partisan balance, therefore, was the only means by which the General Assembly could enact a plan as required by the Court." *Id. See also* JS at 37a (Ervin, J., dissenting) (noting that District 12 had to be drawn to protect incumbents).

Karcher v. Daggett, 462 U.S. 725, 740 (1983); *White v. Weiser*, 412 U.S. 783, 791, 797 (1973); *Burns v. Richardson*, 384 U.S. 73, 89 n.16 (1966); *see also Bush*, 517 U.S. at 964 (opinion of O'Connor, J., joined by Rehnquist, C.J. and Kennedy, J).

At the summary judgment stage, the district court was obligated to accept this testimony as truthful. *See Liberty Lobby*, 477 U.S. at 255 ("The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor"). But instead the court did precisely the opposite - it assumed that these North Carolina legislators had lied under oath in order to hide a racial agenda.[27] In so doing, the court only compounded its errors. As this Court has held repeatedly, courts may not blithely attribute unconstitutional motivations to state legislators. *See Miller*, 515 U.S. at 915-16; *Mueller v. Allen*, 463 U.S. 388, 394 (1983).[28] This Court has made clear that these cautionary principles are fully applicable in *Shaw* cases. *Miller*, 515 U.S. at 915 ("Although race-based decisionmaking is inherently suspect, until a claimant makes a showing sufficient to support that allegation the good faith of a state legislature must be presumed." (citation omitted)); *id.* at

---

[27] That the finder of fact at trial would be the three-judge panel, rather than a jury, does not excuse the court's failure to credit this testimony. Even in a non-jury case, a court ruling on a motion for summary judgment is obligated to accept the testimony of the nonmoving party's witnesses as true. *See, e.g., Nunez v. Superior Oil Co.*, 572 F.2d 1119, 1123-25 (CA5 1978); *Borden, Inc. v. Spoor, Behrins, Campbell, Young, Inc.*, 828 F. Supp. 216, 218-19 (S.D.N.Y. 1993).

[28] When a federal court is called upon to judge the constitutionality of an act of a state legislature, it must "presume" that the legislature "act[ed] in a constitutional manner," *Illinois v. Krull*, 480 U.S. 340, 351 (1987); *see McDonald v. Board of Election Comm'rs of Chicago*, 394 U.S. 802, 809 (1969), and remember that it "'is not exercising a primary judgment but is sitting in judgment upon those who also have taken the oath to observe the Constitution.'" *Rostker v. Goldberg*, 453 U.S. 57, 64 (1981) (quoting *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 164 (1951) (Frankfurter, J., concurring)).

916 (courts adjudicating *Shaw* claims are obligated to accord the challenged plan "the presumption of good faith that must be accorded [all] legislative enactments"). Indeed, the presumption of legislative good faith has even greater force in redistricting cases, given the "sensitive" and highly political nature of the redistricting process and the "serious intrusion" on state political judgments that federal court review of state districting legislation entails. *See id.* at 916 (admonishing lower courts "to exercise *extraordinary caution* in adjudicating claims that a State has drawn district lines on the basis of race" (emphasis added)); *id.* at 916-17 (directing courts to bear in mind the demanding nature of "the plaintiff's burden of proof at trial" and "the intrusive potential of judicial intervention into the legislative realm" when assessing the adequacy of a plaintiff's showing at the summary judgment stage).[29]

---

[29] Precisely for these reasons, lower federal courts entertaining *Shaw* claims have consistently refused to resolve the "predominance" issue without a full evidentiary hearing, except in cases where the defendants have conceded it. Indeed, the decision below is one of only two reported decisions in which a contested issue of "predominance" has been resolved in the *plaintiffs'* favor on summary judgment. The other, that of the three-judge panel in *Johnson v. Mortham*, 915 F. Supp. 1529 (N.D. Fla. 1995), also drew a vigorous dissent. *See id.* at 1560, 1563-68 (Hatchett, Circuit Judge, dissenting) (calling it "grave error" to resolve the "predominance" issue in plaintiffs' favor on summary judgment, given the "complex and important" nature of the case and *Miller's* "directive" to use "'*extraordinary caution* in adjudicating claims that a state has drawn district lines on the basis of race'") (emphasis in original)). The error committed here was even graver, for the plan being challenged in *Johnson* had been drawn by a court, rather than a legislature, making the "predominance" issue considerably less difficult than it is here - and the need for deference less pressing than that owed by a federal court to a state legislative branch.

In short, there was simply no justification for the district court to ignore this Court's directives and grant plaintiffs, rather than defendants, summary judgment. That it did so on such a weak showing - based on imputed motives and without full evidentiary hearing - is even less defensible. The decision should be overturned.

II. THE DISTRICT COURT WRONGLY DENIED THE STATE'S CROSS-MOTION FOR SUMMARY JUDGMENT BECAUSE THE STATE PRESENTED SUBSTANTIAL AND CREDIBLE EVIDENCE THAT DISTRICT 12'S SHAPE AND RACIAL DEMOGRAPHICS WERE THE RESULT OF LEGITIMATE, NON-RACIAL, POLITICAL MOTIVES.

Although partisan voting preferences determined the boundaries of District 12, the district court condemned the district on the basis of party registration data not relied on by the legislature. The district court's conclusion that race was the predominant factor is flawed because the court failed to distinguish between plaintiffs' irrelevant partisan *registration* figures and the actual partisan voting preferences demonstrated by voting *results* - the information in fact used by Senator Cooper and Representative McMahan in the redistricting process. This error was compounded by the court's rejection of a statistically reliable and systematic analysis of the district as a whole in favor of picking and choosing a few isolated examples from around the district. Because of these errors, the court failed to recognize the plaintiffs' utter failure of proof on their required burden to demonstrate predominance of racial

motivation, and hence, that summary judgment should have been granted to the State.

To the extent the shape of District 12 is somewhat irregular and its boundaries correlate with race, the plan's architects, Senator Cooper and Representative McMahan, testified that partisan election considerations, and not race, explain these results. JS at 69a-84a. Their testimony is confirmed by the extensive statistical analysis from Dr. David Peterson.[30] The district court failed to address Dr. Peterson's study, but instead, relied on maps supplied by plaintiffs from three of the six counties in the district. The district court focused on a handful of precincts that border District 12, but were not included in the district despite having Democratic voter-registration majorities, even though the registered Democrats in these districts consistently voted Republican. Because the court failed to require the plaintiffs to meet head-on the state defendants' contemporaneous and documented explanation for the district they drew, the court wrongly concluded that race, not partisanship, must have accounted for the design of District 12 and wrongly denied summary judgment to the State.

---

[30] Dr. Peterson in his analysis traveled along the boundaries of the districts, comparing each precinct included in District 12 with each corresponding excluded precinct that adjoined District 12. From these comparisons, Dr. Peterson concluded that partisan explanations were "at least as strong" and "somewhat stronger" than racial ones in accounting for the District's design. JS at 98a.

A. The State's Reliance On Voting Behavior Does Not Trigger Strict Scrutiny.

This Court has upheld the use of partisan election results in the drawing of district lines so long as race is not used as a proxy for voting preferences. In *Bush*, a majority of this Court made clear that a district is not subject to strict scrutiny simply because there is some correlation between its lines and racial demographics, if the evidence establishes that those lines were in fact drawn on the basis of political voting preference, rather than race. *See* 517 U.S. at 968 (opinion of O'Connor, J., joined by Rehnquist, C.J. and Kennedy, J.) ("If district lines merely correlate with race because they are drawn on the basis of political affiliation, which correlates with race, there is no racial classification to justify, just as racial disproportions in the level of prosecutions for a particular crime may be unobjectionable if they merely reflect racial disproportions in the commission of that crime."); *id.* at 1027-29 (Stevens, J., joined by Ginsburg and Breyer, JJ., dissenting); *id.* at 1059-60 (Souter, J., joined by Ginsburg and Breyer, JJ., dissenting).

Contrary to the district court's suggestion, this is not a situation like that in *Bush*, where the state has used race "as a proxy for political characteristics" in its political gerrymandering.[31] *See* JS at 22a, n.7 (citing *Bush*, 517 U.S. at

[31] By contrast, the undisputed evidence here established that the racial data available to the North Carolina legislature was no more detailed than the other demographic data it used: racial demographics, voter registration and election results. All are reported at the precinct level. *Compare Bush*, 517 U.S. at 961-67, 969-70, 975 (plur. op.) (finding legislature's use of racial data that was significantly more detailed than its data on other voter

968 (plur. op.). Instead, the undisputed evidence in the record showed that the State used political characteristics, as represented by actual election results, not racial data, to draw the lines. *Bush* specifically stated, that the legislature's use of such "political data" to accomplish otherwise legitimate "political gerrymandering" will not subject the resulting district to strict scrutiny, "regardless of its awareness of its racial implications and regardless of the fact that it does so in the context of a majority-minority district." 517 U.S. at 968 (plur. op.); *see id.* at 1027-29 (Stevens, J., joined by Ginsburg and Breyer, JJ., dissenting); *id.* at 1059-60 (Souter, J., joined by Ginsburg and Breyer, JJ., dissenting). In this case, legitimate the use of political data to design District 12 - which did not result in a majority-minority district - does not trigger strict scrutiny and there is no racial classification to justify.

B. The Disparity Between Party Registration And Voting Behavior In North Carolina Explains The Shape And Racial Demographics Of District 12.

The district court's analysis of District 12 completely failed to take into account that voters in North Carolina often do not vote in accordance with their party affiliation. The affidavits in the record state that in predicting the partisan voting patterns of various precincts, the legislature did not rely on voter registration data but, rather, employed the far more meaningful and reliable method of *actual election results*. As Senator

demographics to be convincing circumstantial evidence that race had been its predominant consideration in designing the challenged districts).

Cooper's stated, "election results were the principal factor which determined the location and configuration of all districts in Plan A [the Plan at issue here] so that a partisan balance which could pass the General Assembly could be achieved."[32] The district court did not address the State's affidavits directly. Instead, relying on plaintiffs' maps, the court focused on a few precincts with Democratic majority voter registration rates that bordered District 12 but were not included in the district. Based on these isolated examples, the court concluded that the "uncontroverted material facts" demonstrate that District 12 was drawn based on racial identification, rather than political identification, because some Democratic majority precincts were bypassed in drawing the district. JS at 21a. But party registration data was precisely what the legislature chose *not* to use in constructing its districts, since such data was less reliable than actual voting histories in guaranteeing specific partisan outcomes.[33]

---

[32] JA 73a. Representative McMahan's affidavit states: "The means I used to check on the partisan nature of proposed new districts was the election results in the General Assembly's computer data base (the 1990 Helms-Gantt election and the 1988 elections for Lieutenant Governor and one of the Court of Appeals seats)." JA 81a-82a.

[33] Even on the present record, the registration maps relied on by the court demonstrate that, with only very rare exceptions, the excluded precincts consistently have Democratic voter registration below 60%, while the adjoining precincts included in the district consistently have higher Democratic voter registration ranging from 60% to over 90%. On the rare occasions when a precinct within the district is between 50% and 60% in Democratic registration, the Democratic registration for each such district consistently is higher than that for its adjoining excluded precinct. *See* McGee Aff. (CD 61), Exs. N, O and P, lodged with the Court.

Far from this being a minor technical matter, the use of actual voting patterns rather than registration rates is highly probative on how precincts actually vote and hence which ones are genuinely safe Democratic precincts.[34] In North Carolina, many voters who have long been registered as Democrats vote Republican in national or statewide races.[35] In North Carolina, voter registration is obviously not a reliable indicator of actual voting patterns.[36]

---

[34] Not until its memorandum opinion was filed did the court indicate its misunderstanding of the relevance of registration data. If given the opportunity to address the court's concern, the defendants would have provided the far more probative election results for the excluded precincts highlighted by the court. The majority of these precincts show dominant Republican voting majorities.

[35] As of 1990, 65% of the State's voters were registered as Democrats and 30% as Republicans. Yet in the 1988 Presidential election, George Bush received 58% of the vote compared to Michael Dukakis' 42%; in 1992, George Bush and Bill Clinton each received 43%. Since 1992, the State has had two Republican Senators. *See* The Almanac of American Politics 1990, 1994 and 1996. (The demographic and registration data available on the State's redistricting computer is based on 1990 information.)

[36] If voter registration were a reliable measure of partisan preference, then the Republican-controlledState House would never have agreed to the redistricting plan. Based on registration figures, 10 of 12 districts have Democratic majorities in registration and an eleventh district has a Democratic plurality (49.32% Democratic to 43.81% Republican). There is one Republican district, but only with a plurality in registration (46.80% Republican to 46.55% Democratic). JA at 105-07. District 12 itself demonstrates the often significant disparity between registration and voting patterns: the District has a 75% Democratic registration, but only a 62% Democratic preference in election results. JS at 99a.

Seeking to generate a congressional districting plan that would as a whole preserve the existing partisan balance, and seeking to make District 12 a Democratic district as part of this plan, the legislature for understandable reasons did not rely on voter registration rates, but on actual election data - as the two key political actors, Senator Cooper and Representative McMahan, testified in their affidavits. The magnitude of the court's error in failing to consider the proper criteria in its equal protection analysis warrants reversal of the court's decision.

C. To Determine The Legislature's Predominant Motivation In Designing A District, The Court Must Consider The District As A Whole.

The court's analysis was deficient in other key respects. In weighing the evidence before it, the court both examined the wrong criteria and focused on isolated precincts, rather than reviewing the design of the district as a whole. Had the court conducted the complex predominant motive inquiry properly, it could not have justified a grant of summary judgment to plaintiffs. The court also did not take into account the statistically sound and comprehensive analysis of District 12 made by Dr. Peterson. The results of this report should have, at a minimum, raised a genuine issue of material fact and more likely, helped establish defendants' entitlement to summary judgment.

Judicial inquiry into the design of a congressional district is a complex and demanding task. In the legislative districting context, partisan actors must make decisions about the general

location of the various districts in the plan as a whole. These are strongly interlocking decisions, of course, because for partisan purposes, what matters is not any district in isolation, but the predicted partisan effects of the plan as an entirety. *See, e.g., Davis v. Bandemer*, 478 U.S. 109, 145 (1986) (O'Connor, J., concurring in the judgment) ("The opportunity to control the drawing of electoral boundaries through the legislative process of apportionment is a critical and traditional part of politics in the United States, and one that plays no small role in fostering active participation in the political parties at every level.").

This is the general, complex context against which courts must adjudicate the role of race - and in particular, whether race predominated. In this case, the district court failed to apply the "predominant motive" standard in a manner that systematically analyzed District 12 as a whole. District 12 contains 155 precincts. Yet, the district court focused on three of the six included counties, and concentrated on only 32 excluded precincts with Democratic voter-registration majorities. Based on its isolation of these particular precincts, the district court wrongly concluded that the district as a whole had been drawn with a predominantly racial purpose. Thus, even if the court had not misunderstood the difference between voter registration data and actual election results, its approach to applying *Shaw* - by picking and choosing selected features of a district, rather than examining the district as a whole - was fatally flawed.

There are likely a number of techniques through which lower courts statistically could analyze the predominant redistricting motivation for a district as a whole. Here the State offered one such approach. The State submitted an extensive

statistical analysis from an expert statistician that did not isolate a small number of precincts, but instead comprehensively examined all of District 12 and its surrounding territory. Dr. Peterson concluded that racial considerations did not predominate in the drawing of District 12. JS at 87, 98a. This statistical analysis, along with the testimony of the legislators, should have been enough to enable the State not only to defeat plaintiffs' motion for summary judgment, but also to obtain judgment in its favor. This is not to say that this statistical analysis is the only means of bringing more than anecdotal perspectives to bear on applying the predominant motive test. But this method of analysis does provide at least one way lower courts, as well as redistricters seeking to comply in good faith with *Shaw*, can gain more concrete guidance into how to assess whether the predominant motive for a district or districting plan rests on constitutional permissible considerations.

The point of such method is to offer a more reliable means than intuitive, ad hoc, and necessarily subjective approaches to judging the "predominant motive" in these highly charged, yet analytically complex cases. In other areas of the judicial oversight of districting, this Court has similarly turned to more systematic or quantitative approaches, in part to make the application of legal standards administrable for both lower courts and redistricters. Thus, in giving content to the concept of racial polarization under Section 2 of the Voting Rights Act, this Court endorsed the use of homogenous precinct and ecological regression analysis. *Thornburg v. Gingles*, 478 U.S.

30, 58-61 (1986).[37] More systematic and quantitative means of overseeing districting decisions are less easily manipulable by political actors engaged in what is the most intensely partisan and self-regarding of all political acts; they also enable redistricters seeking in good faith to comply with their statutory and constitutional obligations to know those obligations with greater clarity. The absence of such standards encourages not only manipulation, but also litigation, and therefore requires courts to get drawn into overseeing redistricting on a case-by-case basis in a far more intrusive way.

The district court dismissed Dr. Peterson's extensive analysis simply by pointing to various excluded "Democratic" precincts that bordered the District. Even had the court not been factually mistaken (in its reliance on voter registration rather than voter behavior data), its leap from an examination of selected excluded precincts to a judgment about the districting process as a whole was legally defective. For what the court did was to reject the State's comprehensive assessment of the District as a whole in favor of focusing on a few "pick-and-choose" examples. In essence, the district court ignored or dismissed a complete, statistically reliable result by offering up some anecdotal points that ran contrary to the overall pattern. Both legally and statistically, the court's approach is unsound. The predominance standard requires methods by which the

---

[37] Similarly, after malapportionment became constitutionally actionable under *Baker v. Carr*, 369 U.S. 186 (1962), this Court came to adopt a quantitative standard - one person, one vote - partly on the grounds that such a standard was more administrable than more subjectively defined standards.

court can examine a district systematically and comprehensively as a whole before concluding what motive predominated in the overall districting process.

Shaw was announced as a doctrine for extreme, aberrational cases. Under an approach that enables plaintiffs to focus on discrete segments of a district, such as the district court employed here, *Shaw* would expand even further. Indeed, if plaintiffs are encouraged to target particular segments of a district, rather than adducing proof for the district as a whole, *Shaw* will begin to engulf the most microscopic aspects of redistricting. To keep judicial oversight administrable, this Court should clarify that the predominant motive test must be applied to districts as a whole, rather than in the piecemeal fashion permitted by the court below. The stated motivations of the legislators, which are supported by a comprehensive and valid statistical analysis, not only require reversal of the court's judgment, but also justify entry of judgment for defendants.

III. APPLICATION OF STRICT SCRUTINY TO DISTRICT 12 IS UNWARRANTED BECAUSE IT DOES NOT GIVE RISE TO THE KINDS OF HARMS WITH WHICH THE *SHAW-MILLER* DOCTRINE IS CONCERNED.

Shaw reflected constitutional concerns that arise "[w]hen a district obviously is created solely to effectuate the perceived common interests of one racial group." *Shaw I*, 509 U.S. at 648. As this Court has consistently emphasized, it is the *excessive* use of race in districting, not the use of race as one factor, that triggers strict scrutiny. *Shaw's* "basic objective" is

to make "extreme instances" of racial gerrymandering subject to "meaningful judicial review." *Miller*, 515 U.S. at 929 (O'Connor, J., concurring).

As a doctrine designed for "extreme instances" of racial gerrymandering, *Shaw* has led already to courts finding unconstitutional most of the majority-minority congressional districts created in the South after the 1990 Census. If the district court's extension of the doctrine is allowed to stand, *Shaw's* sweep would truly be immense, extending to any district - whether majority-minority or majority-majority - with any significant level of minority population. Not only would this be at odds with the "basic objective" of *Shaw*, but it would undermine the very values that animate the *Shaw* line of cases.

Shaw and its progeny have identified several specific harms that the excessive use of race in districting can cause. First, it can cause "representational" harm. *United States v. Hays*, 515 U.S. 737, 744 (1995). When a district is "obviously . . . created solely to effectuate the perceived common interests of one racial group," certain voters suffer representational harm, because "elected officials are more likely to believe that their primary obligation is to represent only the members of that group, rather than their constituency as a whole." *Shaw I*, 509 U.S. at 648. Second, it can cause "expressive harm," *Bush*, 517 U.S. at 1053 (Souter, J., dissenting), by "convey[ing] the message that political identity is, or should be, predominantly racial," *id.* at 980 (plur. op.). Third, it can cause societal harm, "by carving electorates into racial blocs," *Miller*, 515 U.S. 927, which can "balkanize us into competing racial factions," *Shaw I*, 509 U.S. at 657.

District 12 does not trigger any of these concerns. Far from sending elected officials the message that they represent only the members of a particular racial group, *see Shaw I*, 509 U.S. at 648, District 12, which is majority-majority with a substantial minority population, requires candidates of *any* race - majority *or* minority - to appeal across racial lines to gain election. Given this reality, the concern that the representatives elected from this district will believe their "primary obligation" is to any particular racial group is simply not present.

Nor does District 12 give rise to any expressive harms. Since the district's borders were drawn based on actual voting patterns, rather than on racial characteristics, they do not convey the message that "members of the same racial group - regardless of their age, education, economic status, or the community in which they live - think alike, share the same political interests, and will prefer the same candidates at the polls." *Shaw I*, 509 U.S. at 647. Indeed, it would be racially stereotypical for a court to assume, simply because the district has a significant African-American population, that race was the predominant unifying factor when, in fact, these voters were linked together for a reason that *transcends* race - their *political* identity, as manifested by their engagement in political life and their allegiance to particular Democratic candidates and the issues for which those candidates stand. *Cf. DeWitt v. Wilson*, 515 U.S. 1170 (1995), *summarily aff'g*, 856 F. Supp. 1409 (E.D. Ca. 1994) (three-judge court) (strict scrutiny did not apply to majority-minority district that was drawn according to traditional race-neutral districting principles).

Finally, a district as racially mixed and politically harmonized as District 12 can hardly be seen as "balkanizing" the area into racial factions. The voting patterns in North Carolina revealed that certain precincts in the Piedmont Crescent - precincts that in fact happened to be predominately African-American - were consistently loyal to Democratic candidates, and thus could be joined with certain other precincts in the same area - precincts that in fact happened to be predominantly white - to create a "safe" Democratic district. That does not mean that North Carolina has been carved into racial blocks. The carving - if any - has been done along *political* lines, not racial lines. Separation of voters based on political identity does not offend constitutional norms, even when it happens to correlate to some degree with race. *See Bush*, 517 U.S. at 968 (plur. op.).

Even in the best of circumstances, redistricting is a daunting task for a state legislature. Where, as here, the state has a substantial minority population, with a demonstrated record of voting overwhelmingly for one party, and a divided legislature - with one house controlled by one party, and the other house by the other party - the task is still more difficult. If this Court extends *Shaw* to majority-majority districts with substantial minority populations, states in this position will find it virtually impossible to craft a plan that cannot be tied up for years in the courts.

The difficulty, simply put, is this: to command the approval of both houses of the legislature in such a state, a plan must draw districts that allocate seats proportionally between the two parties. To do so, it will almost certainly have to draw districts

with somewhat irregular shapes. This Court has authorized it to do that. *See Gaffney v. Cummings*, 412 U.S. 735, 751-54 (1973) (State may draw irregular district lines in order to allocate seats proportionately to major political parties); *Bush*, 517 U.S. at 964-65 (plur. op.) (same). But given the size of the minority population and its demonstrated preference for one political party in past elections, any plan drawn to allocate seats evenly between the two parties - even one drawn solely on the basis of partisan political data, like voting patterns in past elections - will almost certainly result in the creation of some districts which, though majority-majority, have a larger percentage of minority voters than others. If the combination of irregular lines and a substantial minority population is sufficient to make a majority-majority district subject to challenge under *Shaw*, then any plan which allocates seats proportionately to the two parties - hence is capable of passing both houses of the legislature - is vulnerable to challenge under *Shaw*. As North Carolina's experience demonstrates, the inevitable result will be that every plan the legislature manages to pass will be the subject of protracted litigation under *Shaw*,[38] and that the federal courts - not the state legislatures - will become the principal architects of the state's congressional and legislative districting plans. This Court should not countenance such an

[38] In this context, it is worth noting that plaintiffs continue to challenge District 12 in the 1998 Interim Plan. That district has a total population that is 62.69% white and 35.58% African-American, a voting age population that is 65.85% white and 32.56% African-American, and a registered voter population that is 66.72% white and 32.99% African-American. *See* Submission of 1998 Congressional Redistricting Plan (CD 94), Attachment 98C-27A-2.

unprecedented intrusion by the federal judiciary into this "most vital" aspect of state sovereignty. *See Miller*, 515 U.S. at 915.

The court below permitted plaintiffs challenging this majority-majority district to trigger the strict scrutiny of *Shaw* simply by showing that the district was somewhat irregular in shape and that its minority population exceeded the percentage of minority residents in the counties from which that district was created. This Court should make clear that the strict scrutiny of *Shaw* cannot be so easily triggered, and that it is appropriate only when the plaintiffs supplement their circumstantial evidence of shape and demographics with substantial *additional* evidence that race was the predominant factor in the district's design, as did the plaintiffs in *Miller*, *Bush* and *Shaw II*.[39] *See Lawyer*, 117 S. Ct. at 2195 (noting that

[39] This additional evidence might consist of statements from the state officials who drafted the plan and shepherded it through the legislature, indicating that they had deliberately set out to create a certain number of "safe" districts for minority-preferred candidates. *See Miller*, 515 U.S. at 916-19 (relying expressly on this kind of "more direct" evidence of a predominately racial purpose); *Bush*, 517 U.S. at 958-76 (plur. op.) (same). Because the best evidence of the legislature's purpose in enacting a particular statute is the conduct or statements of those who actually participated in or contributed to its enactment, *Edwards v. Aguillard*, 482 U.S. 578, 595-96 (1986), the Court might find that *only* that kind of "direct" evidence would suffice. *Cf. Price Waterhouse v. Hopkins*, 490 U.S. 228, 275-76 (1989) (O'Connor, J., concurring) (arguing that plaintiff in individual disparate treatment case under Title VII should be required to produce "direct" evidence of the defendant's impermissible motivation - defined as conduct or statements of the actual decisionmaker that bears directly on the motivation behind the challenged decision - to shift the burden of persuasion on motivation to the defendant); *Starceski v. Westinghouse Elec. Corp.*, 54 F.3d 1089, 1096-97 (CA3 1995) (holding that plaintiffs are required to produce such "direct" evidence to obtain a burden-

this Court has "never suggested that the percentage of black residents in a district may not exceed the percentage of black residents in any of the counties from which the district is created," or that "similar racial composition of different political districts . . . [is] necessary to avoid an inference of racial gerrymandering in any one of them.").

Because the plaintiffs' only evidence that race was the predominant factor in the design of District 12 is an inference they ask the court to draw from its shape and racial demographics, their claim fails as a matter of law, and the state defendants are entitled to judgment as a matter of law.

CONCLUSION

For the forgoing reasons, this Court should reverse the district court's judgment for plaintiffs and remand for entry of judgment in favor of the state defendants. In the alternative, the Court should reverse the district court's judgment for plaintiffs and remand for trial.

---

shifting instruction). But the Court need not resolve that question to decide this case, for the plaintiffs here have presented absolutely no additional evidence - "direct" or otherwise - to supplement the inference they ask this Court to draw from their evidence of shape and racial demographics.

Respectfully submitted,

MICHAEL F. EASLEY
North Carolina Attorney General

Edwin M. Speas, Jr.*
Chief Deputy Attorney General

Tiare B. Smiley
Special Deputy Attorney General

Melissa L. Saunders
Special Counsel to Attorney General

Walter E. Dellinger
O'Melveny & Myers LLP

Crystal Nix
O'Melveny & Myers LLP

November 10, 1998

*Counsel of Record

Supreme Court, U.S.
FILED
DEC 8 1998
CLERK

No. 98-85

In the
Supreme Court of the United States
OCTOBER TERM, 1998

JAMES B. HUNT, JR., *et al.*,
Appellants,

and

ALFRED SMALLWOOD, *et al.*,
Intervenor-appellants,

v.

MARTIN CROMARTIE, *et al.*,
Appellees.

On Appeal from the United States District Court
Eastern District of North Carolina

APPELLEES' BRIEF ON THE MERITS

MARTIN B. McGEE
Williams, Boger, Grady,
Davis & Tuttle, P.A.
N.C. State Bar No. 22198
P.O. Box 810
Concord, NC 28026-0810
Telephone: (704) 782-1173

ROBINSON O. EVERETT*
Everett & Everett
N.C. State Bar No. 1385
P.O. Box 586
Durham, NC 27702
Telephone: (919) 682-5691

Counsel of Record

BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Should the constitutionally mandated principles of *Shaw v. Reno* be reaffirmed and fully enforced in the review of a redistricting plan required in order to remedy past violations of equal protection?

2. In granting summary judgment did the district court properly decide that the bizarrely shaped, race-based District 12 failed to meet the requirements of *Shaw v. Reno*?

TABLE OF CONTENTS

Questions Presented i

Table of Authorities v

Statement of the Case 1

A Brief History of North Carolina's Racial Gerrymandering 1

Summary of Argument 8

ARGUMENT –

I. The Constitutionally Mandated Principles of *Shaw v. Reno* Should Be Reaffirmed and Given Full Effect 11

A. *Shaw v. Reno* Properly Applies the Equal Protection Clause to Racial Gerrymanders 11

B. *Shaw v. Reno* Applies Not Only to Majority-Minority Districts 14

C. The Continuing Evasion of the Principles of *Shaw v. Reno* Should Not Be Tolerated 17

D. The *Shaw v. Reno* Requirement of a "Predominant"' Racial Motive Should Be Conformed to Other Equal Protection Precedents 19

E. A Remedial Plan for Violations of *Shaw v. Reno* Requires Especially Demanding Judicial Scrutiny 20

II. The District Court Properly Granted Summary Judgment That North Carolina's Twelfth Congressional District is Unconstitutional 23

A. The Shape and Demographics of North Carolina's Twelfth Congressional District Show Unmistakably that Race Was the Predominant Motive for Its Design 25

1. Race Dictated the Twelfth District's Bizarre Shape and Lack of Compactness 25

2. Contiguity was Subordinated to Racial Considerations 30

3. Political Subdivisions and Actual Communities of Interest Were Subordinated to Racial Considerations 30

B. District 12 Cannot Be Justified by Means of a Spurious Claim That It Was Created with a Political, Rather than Racial, Motive 32

C. The Affidavits of Legislators McMahan and Cooper Do Not Create Any Material Issue of Fact 38

D. The District Court Had No Occasion to Discuss Strict Scrutiny 43

E. The Summary Judgment Also was Proper on Other Grounds 45

Conclusion 48

TABLE OF AUTHORITIES

CASES

Abrams v. Johnson, 117 S.Ct. 1925 (1997) 22

Aleyska Pipeline Serv. Co. v. U.S.E.P.A., 856 F.2d 309 (D.C. Cir. 1988) 24

Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986) 24

Bread Political Action Comm. v. Fed. Election Comm., 455 U.S. 577 (1982) 39

Brown v. Board of Education, 347 U.S. 483 (1954) 16

Brown v. Board of Education, 892 F.2d 851 (10th Cir. 1989) 21

Brown v. Illinois, 422 U.S. 590 (1975) 21

Bush v. Vera, 517 U.S. 952 (1996) ..... *passim*

D & W, Inc. v. City of Charlotte, 268 N.C. 577 (1966) 38

Dayton Bd. of Educ. v. Brinkman, 443 U.S. 526 (1979) 21

Diaz v. Silver, 978 F. Supp. 96 (E.D.N.Y. 1997), *aff'd* 118 S.Ct. 36 (1997) 49

Drum v. Seawell, 250 F. Supp. 922 (M.D.N.C. 1966) 18

Dunaway v. New York, 442 U.S. 200 (1979) 21

Empire Distribs. of N.C. v. Schieffelin & Co., 679 F. Supp 541 (W.D.N.C. 1987) 39

Hays v. Louisiana, 839 F. Supp. 1188 (W.D.La. 1993) 1

Hunter v. Underwood, 471 U.S. 222 (1985) 19

Karcher v. Daggett, 462 U.S. 725 (1983) 28

Lawyer v. Department of Justice, 117 S. Ct. 2186 (1997) 15, 27, 45

Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986) 23

Miller v. Johnson, 515 U.S. 900 (1995) ..... *passim*

Milk Comm'n v. National Food Stores, 270 N.C. 323 (1967) 39

Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274 (1977) 19

Pope v. Blue, 809 F. Supp. 392 (W.D.N.C. 1992), *aff'd*, 506 U.S. 801 (1992) 2

Regional Rail Reorganization Act Cases, 419 U.S. 102 (1974) 39

Reynolds v. Sims, 377 U.S. 533 (1964) 14, 18, 20

Ross v. Communications Satellite Corp., 759 F.2d 355 (4th Cir. 1985) 24

Ross v. Houston Independent Sch. Dist., 699 F.2d 218 (5th Cir. 1983) 21

School Bd. of the City of Richmond v. Baliles, 829 F.2d 1308 (4th Cir. 1987) 21, 22

Shaw v. Hunt, 517 U.S. 899 (1996) ..... *passim*

Shaw v. Hunt, 861 F. Supp. 408 (E.D.N.C. 1994), *reversed* 517 U.S. 899 (1996) 6

Shaw v. Reno, 509 U.S. 630 (1993) ..... *passim*

Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971) 21

Taylor v. Alabama, 457 U.S. 687 (1982) 21

Taylor v. Ouachita Parish Sch. Bd., 648 F.2d 959, (5th Cir. 1981) 21

Thornburg v. Gingles, 478 U.S. 30 (1986) 14

United States v. Lawrence County Sch. Dist., 799 F.2d 1031 (5th Cir. 1986) 21

Village of Arlington Heights v. Metropolitan Dev. Corp., 429 U.S. 252 (1977) 2, 19, 20, 46

Wise v. Lipscomb, 437 U.S. 535 (1978) 22

Wong Sun v. United States, 371 U.S. 471 (1963) 21, 23

CONSTITUTION AND STATUTES

U.S. Constitution, Amendment XIV 13

Fed. R. Civ. P. 56(c) 9, 23

N.C. Gen. Stat. Section 163-201(a) 7

N.C. Sess. Laws 1998-2 7

OTHER AUTHORITIES

11A Charles A. Wright, *et al.*, Federal Practice and Procedure Sec. 2948 24

Richard H. Pildes & Richard G. Niemi, *Expressive Harms, "Bizarre Districts," and Voting Rights: Evaluating Election-District Appearances After* Shaw v. Reno, 92 Mich. L. Rev. 483 (1993) 25

STATEMENT OF THE CASE

A Brief History of North Carolina's Racial Gerrymandering

This appeal is yet another of the never-ending efforts by the appellants and their allies to perpetuate racial gerrymanders in North Carolina. To that end, they have employed specious arguments,[1] posed undue procedural objections,[2] and used "post hoc rationalizations" and euphemisms to mask racial motives.[3]

---

[1]For example, in *Shaw v. Hunt*, 517 U.S. 899 (1996) (hereinafter "*Shaw II*"), the Court described as "singularly unpersuasive" the State's claim that the Twelfth District was "narrowly tailored." *Id.* at 917.

[2]Thus, despite the clear intent of this Court's opinion in *Shaw v. Reno*, 509 U.S. 630 (1993) (hereinafter "*Shaw I*"), the State continued to claim that the plaintiffs in *Shaw* had no standing under the Equal Protection Clause because they were white; and a similar argument has now been advanced in the amicus brief of the American Civil Liberties Union. ACLU Br. 14-16. Moreover, in the present appeal, appellants initially asserted that an order in the *Shaw* litigation which approved the 1997 redistricting plan precluded the claim for relief of Cromartie and his fellow plaintiffs – even though (a) appellants did not allege preclusion in their answer or otherwise assert it until filing their appeal; (b) no privity existed to support claim preclusion or collateral estoppel; and (c) the preclusion argument was forestalled by the language of the district court's order in *Shaw*. This contention, which was one of three advanced in the appellants' jurisdictional statement, has apparently now been abandoned, and it is also disavowed by the amicus brief of the United States.

[3]"Post hoc rationalizations" was the term used by the three-judge district court in *Hays v. Louisiana*, 839 F. Supp. 1188 (W.D. La. 1993) to characterize race-neutral defenses of Louisiana's racial gerrymanders by experts, some of whom also defended North Carolina's racial gerrymanders in the *Shaw* litigation. "Minority-opportunity" district was a euphemism used in oral argument to defend the racially gerrymandered Texas districts that were the subject of *Bush v. Vera*, 517 U.S. 952 (1996).

The State's history of stonewall defense of its racial gerrymanders makes its contentions on this appeal seem especially hollow.

To analyze properly the present appeal requires an examination of the history of North Carolina's racial gerrymandering,[4] which begins with a redistricting plan adopted in 1991 that contained only one majority-minority district. After the Department of Justice denied preclearance pursuant to its "maximization policy," that plan was replaced in January 1992 by a redistricting plan that had two majority-black districts. When this plan first was attacked by Republicans as a political gerrymander,[5] the State claimed that its irregular shape reflected the demands of the Civil Rights Division. When the *Shaw* plaintiffs attacked the plan a few weeks later because it was a racial gerrymander, the State never denied that it was race-based. Instead, the racial gerrymander was defended – even in argument before this Court – as being race-based for benign reasons and therefore not in violation of the Equal Protection Clause. Moreover, the State insisted that the *Shaw* plaintiffs lacked standing to make an Equal Protection claim because they all were white.

When this Court rejected these defenses in *Shaw I* and remanded the case for trial, the State adroitly changed its

---

[4]In *Village of Arlington Heights v. Metropolitan Dev. Corp.*, 429 U.S. 252, 267 (1977), the Court noted that "the historical background of the decision is one evidentiary source, particularly if it reveals a series of official actions taken for invidious purposes."

[5]*See Pope v. Blue*, 809 F. Supp. 392 (W.D.N.C. 1992), *aff'd*, 506 U.S. 801 (1992).

position and contended that the 1992 plan actually was not race-based. At trial and on appeal, reliance was placed on novel concepts – such as "functional compactness" – to establish that the two majority-black districts had been created because of factors other than race and therefore the principles enunciated in *Shaw I* had not been violated. Fortunately, the State's "post hoc rationalizations" were rejected in *Shaw II*[6] and further use of the 1992 plan was prohibited. However, despite strenuous efforts by the *Shaw* plaintiffs to persuade either the General Assembly or the district court to put a constitutional plan into effect in time for the 1996 elections, those elections took place in November 1996 pursuant to the same "bizarre" plan that this Court had held unconstitutional several months earlier in *Shaw II*.[7] On March 31, 1997, immediately before the deadline set by the district court, the General Assembly enacted a new redistricting plan, which was then precleared by the Civil Rights Division. Despite a

---

[6]These rationalizations were impossible to reconcile with the shape and demographics of the two majority-black districts, which linked large concentrations of African-Americans by narrow "white corridors," utilized "point contiguousness," split numerous precincts along racial lines, and violated nearly every race-neutral principle of redistricting. *See Shaw II.*

[7]Ironically, in the Texas redistricting litigation – which had commenced some months after suit was brought in North Carolina and which was decided by this Court at the same time as *Shaw II* – the three-judge district court put a new plan into effect for the 1996 election. Of thirty congressional districts in Texas, the new plan altered thirteen districts – more than the entire number of districts in North Carolina. Yet North Carolina's legislature considered it impossible to enact a new plan for the 1996 elections and, by divided vote, the district court declined to intervene.

statement of opposition by the *Shaw* plaintiffs,[8] the district court approved the plan.

In *Shaw II* this Court ruled only on the challenge to the Twelfth District of the 1992 plan because none of the plaintiff-appellants lived in the First District. Therefore, Martin Cromartie and two other residents of the First District filed a complaint on July 3, 1996, which alleged that this district also violated the Equal Protection Clause. Their action, however, was stayed by consent to await enactment by the General Assembly of a new redistricting plan. After the district court in *Shaw* approved the 1997 plan only on a limited basis,[9] an amended complaint was filed in the *Cromartie* action. *See* Joint Appendix (hereinafter "J.A.") 7. It sought a temporary and permanent injunction against use of the 1997 plan. Relying on the data available through the General Assembly's public access computer – data which had been submitted to the Department of Justice in the General Assembly's effort to obtain preclearance for the 1997 plan – the amended complaint not only attacked the "new" First District but also alleged that the Twelfth District in the 1997 plan was composed of parts of

[8]The five *Shaw* plaintiffs all lived in Durham County, which the General Assembly had removed from the Twelfth District. Under *Shaw II* they now lacked standing to challenge that district, although they asserted that it still was an unconstitutional racial gerrymander.

[9]See Memorandum Opinion in *Shaw v. Hunt*, in Appendix to Jurisdictional Statement (hereinafter J.S. App.) 159a. The Court specifically stated that because of the "dimensions of this civil action as that is defined by the parties and the claims properly before us . . . we only approve the plan as an adequate remedy for the specific violation of the individual equal protection rights of those plaintiffs who successfully challenged the legislature's creation of former District 12. Our approval thus does not – cannot – run beyond the plan's remedial adequacy with respect to those parties and the equal protection violation found as to former District 12." J.S. App. 167a.

six counties[10] and that each of those counties

> was divided along racial lines and for a predominantly racial motive. Of Mecklenburg County's black population, 84% was placed in the Twelfth District and 16% in the Ninth; but of its white population 27% was placed in the Twelfth District and 73% in the Ninth. Of Forsyth County's black population, 65% was placed in the Twelfth District and 35% in the Fifth District; but of its white population, 8% was placed in the Twelfth District and 92% in the Fifth. Of Guilford County's black population, 76% was placed in the Twelfth District and 24% in the Sixth; but of its white population, 25% was placed in the Twelfth District and 75% in the Sixth. Of Iredell County's black population, 63% was placed in the Twelfth District and 37% in the Tenth; but of its white population 37% was placed in the Twelfth District and 63% in the Tenth. Of Rowan County's black population, 66% was placed in the Twelfth District and 34% in the Sixth; but of its white population, 23% was placed in the Twelfth District and 77% in the Sixth. Of Davidson County's black population 80% was placed in the Twelfth District and 20% in the Sixth District; but of its white population, 49.6% was placed in the Twelfth District and 50.4% in the Sixth District. The Twelfth District is the only congressional district which under the March 1997 plan

[10]Some plaintiffs had been added who lived in District 12 and therefore had standing under *Shaw II*.

contains no county which is not divided.[11]

After the State defendants had answered, the three-judge district court – of which only one member, Chief Judge Richard L. Voorhees, had participated in the *Shaw* litigation[12] – conducted a hearing on March 31, 1998. Soon thereafter it granted summary judgment for the plaintiffs as to the "new" Twelfth District; and the court permanently enjoined use of the 1997 plan for any primary or general election.[13] However, the court refused summary judgment for either the plaintiffs or defendants as to the 1997 plan's First District. The defendants then unsuccessfully sought a stay from the district court and thereafter from this Court. *See Hunt v. Cromartie* (No. A-793), 118 S. Ct. 1510 (1998). Later, still another fruitless effort was made by the State to delay the effect of the injunction as to six of the congressional districts – namely, the First District and five others in the eastern part of North Carolina.

The district court allowed the General Assembly an opportunity to enact still another plan – which was forthcoming

---

[11]*See* J.A. 16-17. As the amended complaint also noted, Mecklenburg and Guilford Counties – two of North Carolina's most populous counties – had never been in the same congressional district from 1793 until the 1992 redistricting plan was enacted; nor had Mecklenburg been in the same district with Forsyth County – another populous county – during any of this same period. *See id.* See also the corresponding admissions in appellants' answer. *Id.* at 30-31.

[12]During the *Shaw* litigation Chief Judge Voorhees consistently dissented from rulings which supported North Carolina's flagrant racial gerrymander. *See, e.g., Shaw v. Hunt*, 861 F. Supp. 408, 477 (E.D.N.C. 1994) (Voorhees, C.J. dissenting), reversed by *Shaw II*.

[13]The 1997 plan was never used in an election. The 1992, 1994, and 1996 elections were conducted under the 1992 plan while the 1998 election took place under the 1998 plan.

in May 1998. Under this plan, the First District was left unchanged; but instead of splitting six counties, the Twelfth District now contained one entire county and split only four. The percentage of African-Americans in this district was also reduced from 46.67% to 35.58%, although the Twelfth District still linked two major urban concentrations of African-Americans – one in Charlotte and the other in Winston-Salem. The 1998 plan contained a unique provision that it would be "effective for the elections for the years 1998 and 2000 *unless the United States Supreme Court reverses the decision holding unconstitutional G.S. 163-201(a) as it existed prior to the enactment of this act.*"[14]

The plaintiffs informed the district court that they opposed the 1998 plan because – even though an improvement on its predecessors – the plan still was an unconstitutional racial gerrymander. However, the court authorized the State to use this plan for the 1998 congressional primaries – which were deferred until September – and for the general election on November 3, 1998. *See* J.S. App. 175a. The district court prescribed a discovery schedule in preparation for a trial as to the constitutionality of the First District and stated that it also would consider any additional evidence that plaintiffs might offer with respect to the Twelfth District's unconstitutionality. After appellants filed their jurisdictional statement, the district court, by consent of all the parties, stayed proceedings to await the outcome of this appeal. Meanwhile, Cromartie and the other appellees in this case appealed the order which allowed

---

[14]*See* N.C. Sess. Laws 1998-2, enacted May 21, 1998 (emphasis added), which is discussed in Appellees' Motion to Dismiss or, in the Alternative, to Affirm at 10. Under this unique provision, if this Court "reverses the decision" below, the more race-based 1997 plan will come into effect for elections in the year 2000, and the Representatives elected on November 3, 1998 will have their districts changed.

the 1998 plan to be used. By their appeal in *Cromartie v. Hunt* (No. 98-450), they seek resolution of several issues also present in this appeal.

SUMMARY OF ARGUMENT

The principles established by *Shaw v. Reno* should be given full effect – not overturned, as some of the amici have urged, or unduly limited, as appellants and all their amici seek. To subject race-based congressional districts to strict scrutiny – as required by *Shaw* and the Equal Protection Clause – assures that racial stereotypes will not mar the electoral process, that members of Congress will not feel an obligation to represent only voters of their own race, and that voters of one race will not feel that they lack a voice if they are represented in Congress by someone of another race. *Shaw* has enhanced the confidence of voters in the electoral process. Fears that it might diminish racial diversity proved groundless.[15]

Because application of the principles of *Shaw v. Reno* produces a more meaningful electoral process and reduces the incentive for racial stereotyping and polarization, those principles should be vigorously applied, rather than left unenforced. Thus, contrary to the position taken by the General Assembly in enacting and defending the 1997 plan, race-based

---

[15]Contrary to predictions by some *Shaw* critics, every African-American who had been originally elected to Congress from a majority-minority district was re-elected in redrawn districts – except for Representative Cleo Fields, who, instead of seeking re-election, ran for governor of Louisiana. In North Carolina, the two African-Americans, Melvin Watt and Eva Clayton, who had been elected three times under the 1992 plan, were handily reelected on November 3, 1998 even though each ran in a district with a lower percentage of black voters than before. Such results demonstrate that African-American candidates do not need a majority-black district to be elected if they campaign vigorously to gain support of all voters, rather than only voters of their own race.

districts – whether or not majority-minority – must be eliminated unless they pass the test of strict scrutiny. Likewise, the Court should not allow evasion of the *Shaw* requirements by the resort to amorphous concepts like "functional compactness" and by the artful phrasing of legislative history and affidavits. Especially in dealing with a remedial plan that the General Assembly purportedly designed to correct the past constitutional defects, the Court should insist that all "vestiges" of the racial gerrymander be eliminated in order to assure that public confidence in the electoral process is restored and that judicial rulings are not circumvented. State appellants' plea for further guidance is surprising because the history of racial gerrymandering in North Carolina reveals that they have consistently disregarded guidance that has already been provided.

The appellants and amici contend that the district court failed properly to apply Federal Rule of Civil Procedure 56(c) in ruling on the motions for summary judgment submitted by plaintiffs and defendants. The language of the court's Memorandum Opinion refutes this argument. The district court's opinion marshals the uncontroverted material facts to demonstrate conclusively that the 1997 version of District 12 was the result of a predominantly racial motive on the part of the legislature. Although "appearances" are not conclusive as to the motive for drawing a particular district, the shape of the Twelfth District, *see* map, J.S. App. 59a – especially when juxtaposed against the race-based Twelfth District of the 1992 plan, *see* map, J.S. App. 61a – is strong evidence as to the racial motive for the plan. The demographics of the district and its violation of traditional race-neutral principles are additional evidence. Finally, the history of the plan – including some significant contradictions between the plan and the stated reasons for its enactment – constitutes still further evidence of the racial motive. The uncontroverted evidence was more than enough to

warrant summary judgment for the plaintiffs.

Although the issue was not raised in the Jurisdictional Statement or in the State appellants' brief, intervenor-appellants and some of the amici contend that the district court should have engaged in "strict scrutiny" of the race-based District 12. Nothing in the record suggests that the district was created in response to a "compelling governmental interest" or that it embodied "narrow tailoring." Indeed, for appellants to claim that the district met strict scrutiny would be inconsistent with their insistence that there had been no racial purpose in its design. Moreover, incumbent protection and maintaining partisan balance – the claimed reasons for the 1997 plan - could not be considered "compelling" governmental interests; and to assert that the "new" Twelfth District was "narrowly tailored" would defy this Court's treatment of its predecessor in *Shaw II*.[16]

Even if the district court had not found specifically from the uncontroverted facts that race was the General Assembly's predominant motive for drawing District 12, the summary judgment was proper. Approval of a remedial plan requires close judicial scrutiny to assure that any unconstitutional taint of the replaced plan has been eliminated. When, as with North Carolina's District 12, the "new" district admittedly preserves the "core" of the original district, retains many "appearances" of that district, seeks to guarantee reelection of incumbent elected from the replaced district, and violates "traditional districting principles," it cannot be approved.

---

[16]The General Assembly's later enactment of the less race-based, more compact 1998 plan for the same claimed purpose of incumbent protection and maintaining partisan balance also indicates that these stated purposes are disguises for a predominant racial motive.

ARGUMENT

I. THE CONSTITUTIONALLY MANDATED PRINCIPLES OF *SHAW V. RENO* SHOULD BE REAFFIRMED AND GIVEN FULL EFFECT.

A. *Shaw v. Reno* Properly Applies the Equal Protection Clause to Racial Gerrymanders.

Some of the amici, such as the American Civil Liberties Union, wish this Court to overrule *Shaw v. Reno* in anticipation of "the millennium census and the next round of redistricting." ACLU Br. 4. Apart from the importance of stare decisis in assuring respect for our legal system,[17] the overruling of this landmark decision would be properly perceived as a dismaying step backwards. Public confidence in the integrity of the electoral process would be destroyed by such a repudiation of the Court's perceptive observation in *Shaw I* that:

> [W]e believe that reapportionment is one area in which appearances do matter. A reapportionment plan that includes in one district

---

[17]In *Vera*, Justice O'Connor wrote:

> Our legitimacy requires, above all, that we adhere to stare decisis, especially in such sensitive political contexts as the present, where partisan controversy abounds. Legislators and district courts nationwide have modified their practices – or, rather, reembraced the traditional districting practices that were almost universally followed before the 1990 census – in response to *Shaw I*. Those practices and our precedents, which acknowledge voters as more than mere racial statistics, play an important role in defining the political identity of the American voter.

517 U.S. at 985.

> individuals who belong to the same race, but who are otherwise widely separated by geographical and political boundaries, and who may have little in common with one another but the color of their skin, bears an uncomfortable resemblance to political apartheid. It reinforces the perception that members of the same racial group – regardless of age, education, economic status, or the community in which they live – think alike, share the same political interests, and will prefer the same candidates at the polls.

Shaw I, 509 U.S. at 647. A license would be granted to resurrect the distorted race-based districts for which *Shaw* spelled doom.[18] Apparent approval would be given to the polarizing view held by some legislators that their primary responsibility is to represent voters of their own race.[19] If *Shaw I* had not been decided, the Civil Rights Division would have continued to enforce its "maximization policy," which for Section 5 preclearance required states to create majority-black districts in any way possible – no matter how contrary to traditional redistricting principles. *See Miller v. Johnson*, 515

---

[18]Among the bizarre districts for which *Shaw v. Reno* sounded a death knell were North Carolina's "I-85 district," Louisiana's "mark of Zorro district," Georgia's "march to the sea district," New York's "Bullwinkle district," and Texas's "Mogllianni painting districts."

[19]Representative Melvin Watt, an African-American, who in 1992 and thereafter has been elected to Congress from District 12, provided an example of this view when he testified in the trial of *Shaw v. Hunt* that "representing a district that you are consistent with in your philosophies allows you to be consistent in voting your conscience *without buckling under or catering*, as you said my statement said, to other interests that may not predominate in my district [such as the 'business or *white community*.']" 861 F. Supp. 408, 478, n.5 (E.D.N.C. 1994) (Voorhees, C.J. dissenting) (emphasis and brackets in original).

U.S. 900, 917 (1995). Retreating from *Shaw* would pave the way for the Department of Justice once again to impose its will unduly on legislatures engaged in the next decade's redistricting.

Some amici also attack the holding of *Shaw II* that white plaintiffs have standing to complain about majority-black districts. They fail to recognize that a *Shaw* claim is "analytically distinct" from a vote dilution claim, *Miller*, 515 U.S. at 911 (citation omitted); that the Fourteenth Amendment provides that "no state shall deny to *any person* within its jurisdiction the equal protection of the laws" (emphasis added); and that therefore the race of the plaintiff who brings a *Shaw* challenge is immaterial.[20]

The principles of *Shaw* have also been attacked on the ground that their rigorous application will result in burdensome litigation. However, this criticism fails to take into account that much of the past litigation was caused by the Civil Rights Division's abuse of its preclearance authority. *Cf. Miller*, 515 U.S. at 917. Moreover, now that – "in response to *Shaw I*" – legislators and districts courts nationwide have "reembraced the traditional districting practices that were almost universally followed before the 1990 census," *Vera*, 517 U.S. at 985, the occasion for litigation has been greatly reduced. If North Carolina – where *Shaw* arose – had done the same, there would have been no occasion for the present appeal. It is the State's

---

[20]Contrary to the implication in the ACLU brief at 12, nothing in *Shaw* limits its application to majority-black districts. A majority-white district is equally subject to attack if race was the predominant motive for its boundaries – for example, if a district was intentionally "bleached." Indeed, in the pending case of *Daly v. High*, No. 5:97-CV-750-BO (E.D.N.C.), the complaint attacks not only North Carolina's two majority-black districts but also some majority-white districts.

evasion of *Shaw* that has created the problem and generated litigation. In short, those who create the need for litigation by their non-adherence to *Shaw* have no standing to complain about the resulting burden on the courts. This evasion should not be tolerated by this Court.[21] Furthermore, the purported dilemma of legislators caught between the requirements of *Shaw* and the threat of Section 2 litigation has been exaggerated. Legislatures which adhere to traditional districting practices will have few problems so long as they do not divide "geographically compact" groups of minority voters.[22]

B. *Shaw v. Reno* Applies Not Only to Majority-Minority Districts.

Consistent with its refusal to accept the legitimacy of *Shaw* in devising the 1997 plan, the North Carolina General Assembly took the position that *Shaw* applied only to majority-minority districts. Senator Roy Cooper, an attorney who chaired the Senate Redistricting Committee, explained to his fellow senators:

> [W]hen the Court struck down the 12th District it was because the 12th District was majority minority and it said that you cannot use race as the predominate factor in drawing the districts.

[21]In a leading case involving legislative districts, Chief Justice Warren expressed for the Court this view of its responsibility: "We are cautioned about the dangers of entering into political thickets and mathematical quagmires. Our answer is this: a denial of constitutionally protected rights demands judicial protection; our oath and our office require no less of us." *Reynolds v. Sims*, 377 U.S. 533, 566 (1964).

[22]*See Thornburg v. Gingles*, 478 U.S. 30, 50 (1986), which, under certain conditions, requires majority-minority districts for geographically compact groups of minority voters. In this instance, the legislature may be "race-conscious" in order to avoid splitting such groups.

> Well, guess what! The 12th District, under this plan, is not majority minority. Therefore it is my opinion and the opinion of many lawyers that the test outlined in Shaw v. Hunt will not even be triggered because it is not a majority minority district and you won't even look at the shape of the district in considering whether it is constitutional.

J.A. 132. Likewise, in proposing District 12 to his colleagues, Representative W. Edwin McMahan, who chaired the House Redistricting Committee, stated:

> [It is] not a Majority/Minority District now so shape does not create that – that was the basis the Court used to say this was unconstitutional – not an argument now.

J.A. 121.

This premise – presumably based on advice from the State's Attorney General – is in error.[23] In *Miller*, this Court stated that the plaintiff bears the burden of showing "that race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district." 515 U.S. at 916. Although the Court was discussing Georgia's majority-black districts, the rationale of *Miller* and *Shaw* is not limited to majority-black districts. In *Lawyer v. Department of Justice*, 117 S. Ct. 2186, 2195 (1997), the Court's discussion of whether a Florida reapportionment plan subordinated traditional redistricting principles to race does not intimate that the legislative district under attack was immune

[23]In his dissent in the court below, Judge Ervin made the same error. *See* J.A. 30a.

from the application of *Shaw* principles simply because it was "not a majority black district, the black voting-age population being 36.2%." As *Miller* points out, *Shaw* – like *Brown v. Board of Education*, 347 U.S. 483 (1954) and other leading precedents – is based on the idea that "[a]t the heart of the Constitution's guarantee of equal protection lies the simple command that the Government must treat citizens as individuals, not as simply components of a racial, religious, sexual or national class." 515 U.S. at 911 (citations omitted). In creating District 12, the General Assembly moved a "significant number" of African-Americans into District 12 and as an inevitable consequence moved a "significant number" of whites into adjacent districts.[24] These citizens, black and white, were not treated as "individuals" but as components of a racial class – as "mere racial statistics," *see Vera*, 517 U.S. at 985. The very fact that the legislators believed that *Shaw I* did not apply to majority-white districts helps explain the State's claim that the legislators attempted to comply with *Shaw* even though they created an obviously race-based district in violation of traditional districting practices.[25]

---

[24]Two major concentrations of African-Americans in the northern part of the state – 70,114 in Guilford County and 43,105 in Forsyth County – were placed in the same district as Mecklenburg County, which is on the South Carolina line. The obvious purpose was to link them with 113,442 African-Americans in Mecklenburg County. The district court's Memorandum Opinion spells out in some detail how this "significant number" of African-Americans were placed – precinct by precinct – in District 12. The maps lodged with the Court by appellees make quite evident the racially motivated placement of "significant numbers" of voters "within or without" District 12.

[25]This fundamental misunderstanding of *Shaw* by the General Assembly contradicts the appellants' assertion that "[t]hese legislators [Representative McMahan and Senator Cooper] testified under oath that they and their colleagues were well aware, when they designed and enacted the 1997 plan, of the constitutional limitations imposed by this Court's decisions in *Shaw* and its progeny. . . ." *See* St. App. Br. 25.

C. The Continuing Evasion of the Principles of *Shaw v. Reno* Should Not Be Tolerated.

Appellants and their allies have consistently derided *Shaw* as being concerned only with "appearances." However, not only do appearances of a district have significance in generating racial perceptions and polarization, *see Shaw I*, 509 U.S. at 647, but also "appearances" help establish the legislative intent. Thus, in *Miller* the Court made clear that appearances together with relevant demographics are an acceptable means of proving a predominant racial motive. *See* 515 U.S. at 905; *cf. Shaw II*. In urging that a direct admission by the legislature of a predominant racial motive is necessary, appellants disregard the Court's own language in *Miller*, which clearly stated that circumstantial evidence was a permissible alternative. Seeking to achieve their objective indirectly, appellants insist that even if a predominant racial motive is clearly revealed by a redistricting plan's shape, demographics, and violation of traditional redistricting principles, summary judgment cannot be entered if two legislators execute affidavits denying a racial motive. Accepting this argument would facilitate the evasion of *Shaw* principles, produce delay, and result in unnecessary trials. Appellants' argument is especially vulnerable when, as here, the overwhelming evidence of racial motivation is *not* "directly contradicted" by the legislators' affidavits[26] and when these affidavits not only lack specificity but also are inconsistent with statements made by the same legislators on the floor of the General Assembly, with the State's own preclearance submission, and with the demographics related to the plan.

---

[26]Question 1 in State appellants' brief assumes that plaintiffs' evidence was "directly contradicted" by the affidavits of Senator Cooper and Representative McMahan. As discussed later in detail, this assumption is totally erroneous.

Another means for evading *Shaw* requirements and masking a racial motive is use of the amorphous concept of "functional compactness." Because this concept – unlike geographical compactness[27] – cannot be quantified, it can be employed to conceal the use of racial stereotypes. As employed by the State in the *Shaw* litigation to defend the 1992 plan and now the 1997 plan – and as it has been used to defend other racial gerrymanders – "functional compactness" assumes that blacks who live in one city necessarily have more in common with blacks in another city than they have in common with white neighbors in their own city – even though their white neighbors may work in the same offices and factories as these blacks, shop in the same stores, have children in the same schools, read the same newspapers, watch the same television stations, listen to the same radio stations, have the same local government officials, and serve on the same juries. Contrary to this

[27]The "perimeter measure" and "dispersion measure" of geographical compactness are familiar to this Court and helped demonstrate the lack of compactness of the districts involved in *Shaw II* and *Bush v. Vera*. According to appellants' expert, Dr. Gerald R. Webster, these "[t]wo compactness measures . . . are now among the most commonly recognized and applied by legal and academic scholars." J.S. App. 120a. In this case, they were used by plaintiffs' experts – Dr. Ron Weber, Dr. Timothy O'Rourke, Dr. Thomas Darling, and Dr. Carmen Circinione – in reaching their unanimous opinion that the legislature designed District 12, as well as District 1, with a predominant racial motive. Although "compactness" and "contiguousness" of districts are not constitutional requirements, their absence has equal protection implications, because it contradicts the rationale for having geographically defined districts. *Cf. Reynolds v. Sims*, 377 U.S. at 568, n.21 (Alabama apportionment plan "presented little more than crazy quilts, completely lacking in rationality, and could be found invalid on that basis alone"); *Drum v. Seawell*, 250 F. Supp. 922, 925 (M.D.N.C. 1966) (setting aside North Carolina's redistricting plan because protection of incumbent congressmen predominated "over the requirements of practicable equality, and we think that compactness and contiguity are aspects of practicable equality").

assumption, few residents of Charlotte – regardless of their race and regardless of their "drive time"[28] to Greensboro and Winston-Salem – would recognize their "functional" identity with residents of Greensboro and Winston-Salem; and vice versa. Moreover, when, as in North Carolina's redistricting, "functional compactness" has been used repeatedly to justify congressional districts in which geographically separated concentrations of blacks are linked together but has not been used to explain how majority-white districts are linked together, this circumstance is added proof of the legislature's disguised racial motive.

D. The *Shaw v. Reno* Requirement of a "Predominant" Racial Motive Should Be Conformed to Other Equal Protection Precedents.

In *Village of Arlington Heights v. Metropolitan Dev. Corp.*, 429 U.S. 252, 265-66 (1977), this Court ruled that in reviewing legislative or administrative action to determine if it violated equal protection the issue is whether "there is a proof that a discriminating purpose has been a motivating factor in the decision." If so, "judicial deference" to the legislature or administrative body "is no longer justified." *Id, cf. Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977). "Once racial discrimination is shown to have been a 'substantial' or 'motivating' factor behind enactment of the law, the burden shifts to the law's defenders to demonstrate that the law would have been enacted without this factor." *Hunter v. Underwood*,

[28]Dr. Stuart's affidavit about "average driving times in an automobile" – in which "[n]o allowances were made for possible rush hour traffic congestion" – not only ignores "rush hour congestion" in the cities involved, but also makes no mention of the fact that Charlotte is in one metropolitan area and one media market, while Greensboro and Winston-Salem are in a different metropolitan area and media market. J.S. App. 101a.

471 U.S. 222, 228 (1985). The issue then is whether the same action would have been taken in the absence of the racial motive – whether that motive was a "but for" cause of the action. To promote consistency with these other equal protection cases, appellees submit that the *Shaw* requirement of discriminatory intent should be phrased in terms other than a "predominant racial motive" and that the inquiry should be whether the legislature had a racial motive without which the redistricting plan would not have been enacted. Although avoidance of judicial interference with the authority of state legislatures is an important goal, even more important in our democratic society is preservation of the rights of the voters who elect the state legislators and representatives to Congress. "The right to vote freely for the candidate of one's choice is of the essence of a democratic society." *Shaw I*, 509 U.S. at 639 (quoting *Reynolds*, 377 U.S. at 555). If the *Arlington Heights* test is used to prevent other race-based violations of the right to equal protection, consistency and the avoidance of confusion would dictate that it be used to prevent unconstitutional racial gerrymanders.[29]

E. A Remedial Plan for Violations of *Shaw v. Reno* Requires Especially Demanding Judicial Scrutiny.

After racial segregation in the schools was held by this Court to violate equal protection guarantees, many federal district courts were required to oversee the process of school desegregation. For their guidance, the Court emphasized that once an equal protection violation had been proven, local school

[29]Of course, in this case the district court expressly determined from the uncontroverted material facts that the General Assembly's racial motive was predominant. Obviously the same evidence would establish that, absent the legislature's racial purpose, any redistricting plan enacted would have been quite different.

authorities must "eliminate from the public schools all vestiges of state-imposed segregation." *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 15 (1971).[30] In another school desegregation case, the Court made clear that the Dayton Board of Education was "under a continuing duty to eradicate the effects" of segregated schools. *See Dayton Bd. of Educ. v. Brinkman*, 443 U.S. 526, 537 (1979). Various courts of appeal have rendered decisions to the same effect.[31] Somewhat analogous are cases which discuss the effects of the violation of due process rights by government agents and which hold that confessions are inadmissible if they result from an unconstitutional search or arrest. *See Wong Sun v. United States*, 371 U.S. 471, 484 (1963); *Brown v. Illinois*, 422 U.S. 590 (1975); *Dunaway v. New York*, 442 U.S. 200, 216 (1979); *Taylor v. Alabama*, 457 U.S. 687 (1982).

In line with these precedents, it deserves emphasis that the 1997 redistricting plan reviewed by the district court was a "remedial plan" adopted after North Carolina's 1992 plan had been held unconstitutional. Although a legislature must be given

[30]Such "vestiges" include faculty assignments, transportation, student assignments, and "racially-identifiable" schools. *See United States v. Lawrence County Sch. Dist.*, 799 F.2d 1031, 1043 (5th Cir. 1986).

[31]*See, e.g., Brown v. Board of Education*, 892 F.2d 851, 859 (10th Cir. 1989) (defendant Board of Education must prove its efforts to comply with desegregation orders had "eliminated all traces of past intentional desegregation to the maximum feasible extent"); *Taylor v. Ouachita Parish Sch. Bd.*, 648 F.2d 959, 967-68 (5th Cir. 1981) (failure of school authorities to eradicate the "vestiges" of *de jure* segregation is a constitutional violation); *Ross v. Houston Independent Sch. Dist.*, 699 F.2d 218, 225 (5th Cir. 1983) (a school system must "eradicate, root and branch, the weeds of discrimination"); *School Bd. of the City of Richmond v. Baliles*, 829 F.2d 1308, 1311 (4th Cir. 1987) (once the equal protection violation has been established, plaintiff is "entitled to the presumption that current disparities are causally related to prior segregation, and the burden of proving otherwise rests on the defendants").

a reasonable opportunity to meet constitutional requirements by adopting a substitute measure rather than for a federal court to devise its own plan, *see Wise v. Lipscomb*, 437 U.S. 535, 540 (1978), this is consistent with requiring that district courts examine the remedial plan with special care to assure that no "vestiges" of the unconstitutional racial gerrymander remain and that all "traces" of the earlier predominant racial motive have been rooted out. Moreover, when – as with North Carolina's 1992 and 1997 redistricting plans – a clear resemblance exists between the earlier unconstitutional plan and the remedial plan, *see* J.A 59a and 61a, a plaintiff is entitled to the presumption that "current disparities are causally related" to the earlier gerrymander and the "burden of proving otherwise rests on the defendants." *Cf. School Bd. of the City of Richmond v. Baliles*, 829 F.2d at 1311.

In defending the 1997 plan, appellants insist that their goals were political – to protect incumbents, maintain a partisan balance, and maintain the cores of earlier districts. *See* St. App. Br. at 24-25. However, since all the incumbents were elected pursuant to an unconstitutional plan, their "protection" – to whatever extent it may be related to retaining the "cores" of the districts that elected those incumbents – is the antithesis of eliminating all "vestiges" and "traces" of the 1992 racial gerrymander. The same holds true for "maintaining partisan balance" which was achieved under an unconstitutional plan. The goal of retaining the cores of districts in the 1992 plan is reminiscent of the unsuccessful reliance by the appellants in *Abrams v. Johnson*, 117 S. Ct. 1925 (1997), upon an unconstitutional plan that had been drawn in 1991 to satisfy the Civil Rights Division's unlawful "maximization" policy. As this Court made clear, the baseline for the remedial plan should instead have been the 1982 redistricting plan, which had not been tainted by a predominant racial motive. *See id.* at 1939. Likewise, if the North Carolina General Assembly wished to use

an earlier plan as a baseline, that baseline should have been the plan used for congressional elections in the 1980s – a plan that was not race-driven.

Furthermore, in dealing with a remedial plan, a special danger exists that – as in this case – the legislature will make misleading use of labels and will claim spuriously that a racial gerrymander is a "political" gerrymander. Indeed, if such a defense were accepted uncritically, the corollary would be that in 1997 the General Assembly could have reenacted the original 1992 redistricting plan and then defended it because now its predominant motive was "political" – protecting incumbents and maintaining the existing partisan balance. The "political" defense should be summarily rejected in this case where the "fruit" of an unconstitutional racial gerrymander are used to justify perpetuating that same constitutional violation.[32]

II. THE DISTRICT COURT PROPERLY GRANTED SUMMARY JUDGMENT THAT NORTH CAROLINA'S TWELFTH CONGRESSIONAL DISTRICT IS UNCONSTITUTIONAL.

Summary judgment is appropriate when no genuine issue exists as to any material fact and on the uncontroverted material facts the moving party is entitled to judgment as a matter of law. *See* Fed. R. Civ. Proc. 56(c). The moving party is entitled to summary judgment when a rational trier of fact, after considering the record as a whole, could not find for the non-moving party. *See Matsushita Elec. Indus. Co. v. Zenith Radio*

---

[32]The logic of the "fruit of the poisonous tree" doctrine – which this Court has applied to protect due process rights, *cf. Wong Sun v. U.S.* – seems equally applicable in preventing violations of equal protection rights.

Corp., 475 U.S. 574, 587 (1986).[33] The moving party must demonstrate the lack of a genuine issue of fact for trial, and if that burden is met, the party opposing the motion must show evidence of a genuine factual dispute. The "quality and quantity of evidence required by the governing law" is to be reviewed on motion for summary judgment. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 254 (1986). The "mere existence of a scintilla of evidence" for the non-moving party's position is insufficient to defeat a properly supported motion; there must be enough evidence for a reasonable jury to find for the non-moving party. *Id.* at 252; *see also Aleyska Pipeline Serv. Co. v. U.S. E.P.A.*, 856 F.2d 309, 314 (D.C. Cir. 1988) ("a motion for summary judgment adequately underpinned is not defeated simply by a bare opinion or an unaided claim that a factual controversy persists"); *Ross v. Communications Satellite Corp.*, 759 F.2d. 355, 365 (4th Cir. 1985) ("[u]nsupported allegations as to motive do not confer talismanic immunity from Rule 56").

Appellants cannot justly contend that Rule 56(c) was improperly applied against them. The district court specifically placed on the plaintiffs "the burden of proving the race-based motive" and stated that "[i]n the final analysis, the plaintiff must show 'that race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district.'" *See* J.S. App. 15a (quoting *Shaw II*, 517 U.S. at 905, and *Miller*, 515 U.S. at 916). The district court concluded that, "based on the uncontroverted material facts before it," the General Assembly "utilized race as a predominant factor in drawing" District 12. J.A. 21a-22a. That

[33]If, instead of granting summary judgment, the district court had ruled only on the plaintiffs' motion for preliminary injunction pending a trial, the court would have weighed the probability of plaintiffs' success on the merits, irreparable harm to plaintiffs' rights, injury to defendants, and public interest. *See* 11A Charles A. Wright, et al., *Federal Practice and Procedure*, Sec. 2948.

conclusion was compelled by all the evidence before the court.

A. The Shape and Demographics of North Carolina's Twelfth Congressional District Show Unmistakably That Race Was the Predominant Motive for Its Design.

The district court, viewing the uncontroverted material facts presented by the appellees and recognizing the dangers articulated in *Shaw I*, properly found that "the General Assembly utilized race as the predominant factor in drawing the District, thus violating the rights to equal protection guaranteed in the Constitution to the citizens of District 12." J.S. App. 22a (footnote omitted). In determining that race was "the 'predominant' consideration in drawing the district lines such that 'the legislature subordinate[s] race-neutral districting principles . . . to racial considerations'" J.S. App. 16a (quoting *Miller*, 515 U.S. at 916), the district court observed that "the legislature disregarded traditional districting criteria such as contiguity, geographical integrity, community of interest, and compactness in drawing District 12 in North Carolina's 1997 plan." J.S. App. 22a.

1. Race Dictated the Twelfth District's Bizarre Shape and Lack of Compactness.

A quick glance at the map of District 12 (*see* J.S. App. 15a) reveals that it fails the "eyeball test" and other well-recognized objective tests of compactness.[34] As the district court

[34]The dispersion measure and perimeter measure of compactness developed by Richard Pildes and Richard Niemi in their 1993 Michigan Law Review article, *Expressive Harms, "Bizarre Districts," and Voting Rights: Evaluating Election-District Appearances After* Shaw v. Reno, 92 Mich. L. Rev. 483, have been much used in *Shaw* litigation and in striking down three racially-gerrymandered Texas districts, this Court noted that

pointed out,

> "[w]hen compared to other previously challenged and reconstituted congressional districts in North Carolina, Florida, Georgia, Illinois, and Texas, District 12 does not fare well. The District's dispersion and perimeter compactness indicators (0.109 and 0.041, respectively) are lower than those values for North Carolina's District 1 (0.317 and 0.107 under the 1997 plan). Similarly, the District suffers in comparison to Florida's District 3 (0.136 and 0.05), Georgia's District 2 (0.541 and 0.411) and District 11 (0.444 and 0.259), Illinois' District 4 (0.193 and 0.026), and Texas District 18 (0.335 and 0.151), District 29 (0.384 and 0.178), and District 30 (0.383 and 0.180)."

J.S. App. 20a-21a. According to Professor Timothy G. O'Rourke, "[i]f the 1992 rankings had remained unchanged, the new version of the 12th would still stand as the 430th least compact district on the dispersion measure and it would rank 423 on the perimeter measure." J.A. 249.[35] Professor Weber, who has provided current rankings based on changes made to other districts, states that "North Carolina 12 ranks either 430 or 431 out of 435 in compactness using the dispersion measure" and "either 432 or 433 of 435 in compactness using the perimeter measure." J.A. 213. As these numbers make clear, "customary and traditional districting practices" have been

---

they were among the twenty-eight least compact in the nation when these measures were applied. *See Bush v. Vera*, 517 U.S. 952 (1996).

[35]Of course, since several districts have changed since 1992 as a result of post *Shaw I* litigation, the actual compactness rankings of District 12 would now rank even lower in any comparison of compactness.

utterly disregarded and District 12 constitutes an "extreme instance of gerrymandering." *See Miller*, 515 U.S. at 928-29 (O'Connor, J., concurring).

The State's Section 5 submission recites that "geographic compactness" was one of five factors emphasized "in locating and shaping the new districts." J.S. at 63a. This assertion is misleading and inconsistent with the facts regarding District 12. This inconsistency suggests that in the preclearance submission State officials sought to conceal the General Assembly's race-based purpose – a concealment which itself provides evidence of that purpose. Likewise, making other districts "geographically compact" but not doing so for District 12 helps prove that this district was different from others – namely, that District 12 was the product of a race-based intent.

In *Lawyer*, the Court pointed out that the senatorial district under attack "is located entirely in the Tampa Bay area, has an end-to-end distance no greater than that of most Florida Senate districts, and in shape does not stand out as different from numerous other Florida House and Senate districts." 117 S. Ct. at 2194-95. Moreover, while that district "crosses a body of water and encompasses portions of three counties, evidence submitted showed that both features are common characteristics of Florida legislative districts, being products of the State's geography and the fact that 40 Senate districts are superimposed on 67 counties." *Id.* On the other hand, North Carolina's District 12 is not "located entirely" in a single metropolitan area, and its shape surely does "stand out as different from" all other North Carolina congressional districts. In fact, the only other North Carolina districts with irregular boundaries are District 1, which is race-based, and those districts which have boundaries coinciding with District 12 or District 1. Unlike *Lawyer*, where the senatorial district under attack was on both sides of Tampa Bay, the bizarreness of District 12 is not a "product" of North

Carolina's geography; nor does it result from the fact that twelve congressional districts are "superimposed" on one hundred counties.

As this Court explained in *Miller*, "[s]hape is relevant not because bizarreness is a necessary element of the constitutional wrong or a threshold requirement of proof, but because it may be persuasive circumstantial evidence that race for its own sake, and not other districting principles, was the legislature's dominant and controlling rationale in drawing its district lines." 515 U.S. at 913; *see also Karcher v. Daggett*, 462 U.S. 725, 755 (1983) ("dramatically irregular shapes may have sufficient probative force to call for an explanation"). In this case, the only "explanation" for the shape and demographics of District 12 is that race was used for its own sake.

The maps and data presented to the district court showed that District 12 meanders though six counties, splitting each along racial lines to pick up virtually every precinct in those counties with a black population over forty percent. *See* J.A. 183. Seventy-five percent of the total population of District 12 comes from parts of Mecklenburg, Forsyth and Guilford Counties which are majority black. *See* J.A. 176. These three population centers are also at the extremes of the District – Mecklenburg at the southern and Forsyth and Guilford at the northern. Forsyth County is divided so that 72.9 percent of the total population allocated to District 12 is African-American, while only 11.1 percent of the total population assigned to District 5 is African-American. *See id.* In Mecklenburg county, 51.9 percent of the total population allocated to District 12 is African-American, while only 7.2 percent of the total population assigned to District 9 is African-American. *See id.* Finally, in Guilford County, 51.5 percent of the total population allocated to District 12 is African-American, while only 10.2 percent of the total population assigned to adjacent District 9 is African-

American. *See* J.A. 183. For any resident of those three counties, the inevitable perception would be that District 12 is race-based.

In *Vera*, when describing the shape of a section of a district held to be unconstitutional, this Court stated that, "the northernmost hook of the district, where it ventures into Collin County, is tailored perfectly to maximize minority population." 517 U.S. at 971. This description aptly describes how District 12 slithers into Forsyth County to extract all precincts but one with an African-American population in excess of forty percent. *See* map, Exhibit O. From Forsyth County, only two precincts with an African-American population of less than forty percent were included in District 12; and those two precincts were at the gateway for District 12's entry into Forsyth from the south. *See* map, Exhibit O.

According to the State's preclearance submission, "functional compactness (grouping together citizens of like interest and needs)" was another of five factors employed in shaping the districts. In this context, "functional compactness" is apparently another name for "community of interest." It calls to mind this Court's observation in *Miller*: "Nor can the State's districting legislation be rescued by mere recitation of purported communities of interest." 515 U.S. at 919. The legislative history of the 1997 plan gives no specifics as to any real communities of interest present in District 12. The fact that many residents of District 12 live in cities in the northern part of the state and many others live in a city in the southern part of the State does not give rise to any "community of interest" – especially since the first group is in the Piedmont Triad metropolitan area and the second is in the Charlotte metropolitan area. Once again the State's concealment of motive by citing a non-existent "factor" is an admission by conduct that helps prove the plaintiffs' case.

2. Contiguity Was Subordinated to Racial Considerations.

A narrow land bridge, located in the south-central portion of Mecklenburg County, prevents District 12 from completely dividing both Mecklenburg County and adjacent District 9. This bridge was created by splitting Precinct 77 in such a way that a section less than two miles wide and containing only one of the precinct's 3,462 residents was placed outside District 12. Thus, a single person provides a "human link" so that District 12 does not sever adjacent District 9 and Mecklenburg County into two non-contiguous parts.[36] *See* J.A. 250.[37] Moreover, in several areas District 12 narrows to one precinct wide as it winds through counties, cities and towns to achieve its race-based goal. *See* map, Exhibit M. These narrow corridors enable the district to stretch from Charlotte to Greensboro but minimize the number of "filler" people in between.

3. Political Subdivisions and Actual Communities of Interest Were Subordinated to Racial Considerations.

Despite their claimed goal of "avoidance of the division of counties and precincts," J.S. App. 63a, the General Assembly demonstrated little respect for political subdivisions in creating District 12 and often divided them on the basis of race. The district court described how counties were split in the design of District 12:

---

[36]Since Precinct 77 contains a substantial percentage of African-Americans, the legislature obviously did not want to put the whole precinct into District 9.

[37]The one person in Precinct 77 who was placed in District 9 cannot cast a secret ballot in a congressional election.

> District 12 is composed of six counties, all of them split in the 1997 plan. The racial composition of the parts of the six sub-divided counties assigned to District 12 include three with parts over 50 percent African-American, and three in which the African-American percentage is under 50 percent. However, almost 75 percent of the total population in District 12 comes from the three county parts which are majority African-American in population: Mecklenburg, Forsyth, and Guilford counties. The other three county parts (Davidson, Iredell, and Rowan) have narrow corridors which pick up as many African-Americans as are needed for the district to reach its ideal size.
>
> Where Forsyth County was split, 72.9 percent of the total population of Forsyth County allocated to District 12 is African-American, while only 11.1 percent of its total population assigned to neighboring District 5 is African-American. Similarly, Mecklenburg County is split so 51.9 percent of its total population allocated to District 12 is African-American, while only 7.2 percent of the total population assigned to adjoining District 9 is African-American.

J.S. App. 6a-7a. District 12 is the only district in North Carolina with no intact counties. As Professor Weber stated in his affidavit, "[n]o single district in the country is like North Carolina 12 in splitting as many as six counties and subdividing 100 percent of them." J.A. 209. As the district court noted, cities, like counties, were split along racial lines in creating

District 12. *See* J.S.App. at 7a. According to Professor Weber, 9 of 13 cities or towns – including the four largest cities – were split along racial lines to create District 12. *See* J.A. 184.

B. District 12 Cannot Be Justified By Means of a Spurious Claim that It Was Created with a Political, Rather than Racial, Motive.

Question 2 in State appellants' brief implies that the district court improperly relied on "isolated and sporadic party registration data" when it should have focused on "actual voting results." However, the district court can not be criticized for closely scrutinizing voter registration data because, prior to the March 31 hearing, the defendants had represented to the court that "[t]he leaders of the House and Senate Committee also *had available, and used, voting behavior information consisting of precinct level voter registration data* and the results of the 1990 U.S. Senate election and the 1988 Lt. Governor and Court of Appeals elections." Defendants' Brief in Opposition to Plaintiffs' Motion for Summary Judgment and in Support of Their Cross-Motion for Summary Judgment 7 (emphasis added). This voter registration data was readily available to any member of the General Assembly through its public access computer; moreover, "redistricting legislatures will . . . almost always be aware of racial demographics." *See Miller*, 515 U.S. at 916.

Instead of being "sporadic and isolated," the registration data was quite comprehensive and demonstrated conclusively that in Guilford, Forsyth, and Mecklenburg counties many precincts adjacent to District 12 had high Democratic registration but low percentages of African-Americans and that the exclusion of these precincts from District 12 was clearly attributable to race – not party. As the district court explained:

> the legislature did not simply create a majority-Democratic district amidst surrounding Republican precincts. For example, around the Southwest edge of District 12 (in Mecklenburg County), the legislature included within the district's borders several precincts with racial compositions of 40 to 100 percent African-American; while excluding from the district voting precincts with less than 35 percent African-American population, but heavily Democratic voting registrations.

J.S.App. at 8a. This pattern was repeated in Forsyth and Guilford Counties. *Id.* These and other undisputed facts convinced the district court that "District 12 was drawn to collect precincts with high racial identification rather than political identification." *Id.* at 21a.

In *Vera*, when reviewing Houston districts held unconstitutional, this Court stated that the "district lines correlate almost perfectly with race, while both districts are similarly solidly Democratic." 517 U.S. at 975. North Carolina's registration data shows that the lines dividing precincts of District 12 from the previously mentioned precincts of other districts "correlate almost perfectly with race;" however, both the black precincts within District 12 and the white precincts adjacent to District 12 are "solidly Democratic." As in Texas, this correlation suggests that race was the predominant motive for the district boundaries, but that appellants attempted to conceal this motive by referring to party data.

No one questions that for several decades a very high percentage of African-Americans in North Carolina have registered as Democrats. In the trial of *Shaw v. Hunt*, Melvin Watt, an African-American who has represented District 12 in Congress since 1992, testified that "95% or higher of the

African-Americans registered to vote in North Carolina are registered as Democrats." J.A. 158. Likewise, Gerry Cohen, the staff member of the General Assembly who played the greatest role in redistricting for the General Assembly, testified that in "urban areas" the percentage was 95 percent, but in "rural areas" the percentage was 97 to 98 percent. *Id.* Under these circumstances, legislators can easily claim that any district with a high percentage of blacks was drawn for "political" purposes to obtain Democratic votes. In his affidavit, Dr. Peterson – although admitting the high correlation of District 12's boundaries with race – emphasizes instead the correlation of its boundaries with Democratic party registration and Democratic performance. Because typically the number of black registered voters is exceeded by the number of voters registered as Democrats, he reasons that District 12 was designed with a political, rather than a racial, motive. If, however, more than 95% of the black voters have registered as Democrats, the number of registered Democrats in a precinct will exceed the number of registered blacks – unless white registered voters have registered almost exclusively as Republicans or independents. Thus, the party correlation discussed by Dr. Peterson is misleading and has no significance.

In light of the district's history, it seems obvious that the legislators were assuming that to concentrate large numbers of blacks in the "new" District 12 would guarantee that a black candidate who ran for office would receive a majority in the Democratic primary because of the large number of black voters registered as Democrats. Their second assumption was that the black Democratic nominee then would be elected because he or she had a solid core of support based on the racial loyalty of fellow African-Americans and the party loyalty of some white Democrats. In making these two assumptions the General Assembly relied on "racial stereotypes" and treated a "significant number" of black voters as "mere racial statistics."

Thereby they violated the precepts of *Shaw I*.

Appellants complain that the district court should have used "actual election results" instead of "party registration data."[38] The General Assembly had available the "actual election results" of three statewide elections; and even though State appellants intimate that additional "results" should have been reviewed by the district court, they have given no indication what those result are or how they should be analyzed. Moreover, the court had before it evidence of "actual election results" with exhibits[39] that presented detailed statistical information concerning nine precincts in Mecklenburg, Forsyth and Guilford counties – including, but not limited to, party affiliation, race, and election results of the 1990 Senatorial race, the 1988 race for lieutenant governor and one 1988 Court of Appeals race. All these precincts are contiguous to District 12; and eight are cited by the district court as examples of precincts that should have been included within District 12, if the General Assembly truly were attempting to create a "Democratic island in a largely Republican sea."[40] All nine precincts have an African-American population below 35% and a Democratic registration rate above 50%. Most of these nine precincts,

---

[38]Specifically, State appellants contend that the

> district court focused on a handful of precincts that border District 12, but were not included in the district despite having Democratic voter-registration majorities, *even though the registered Democrats in these districts (sic) consistently voted Republican.*

St. App. Br. 29 (emphasis added).

[39]*See* Exhibits A through I of the exhibits to the Affidavit of Martin B. McGee.

[40]This is the phrase used by Senator Cooper in his affidavit to describe the purpose of District 12. J.S. App. 77a.

however, have a minority population under twenty percent and a Democratic registration rate above sixty percent. Using the election results of the three political races listed above in these nine precincts, there are an aggregate of twenty-seven separate election results by which one could classify these precincts as either Democratic or Republican. The Democratic candidate won in 24 out of 27 contests. Moreover, in many instances the percentage of votes the Democratic candidate received in a precinct was *higher* than the percentage of registered Democrats in that precinct.

The State appellants argue that the district court "concentrated on only 32 excluded precincts with Democratic voter-registration majorities" instead of focusing on the district as a whole. St. App. Br. 35. As has just been pointed out, the court had before it information concerning nine precincts adjacent to District 12 in which the Democratic candidate won in 24 out of 27 contests, but had a black population of less than 35%. Within these precincts reside a total of 31,130 persons whose precinct was assigned to a district other than District 12 for predominantly racial purposes. That purpose was to permit the inclusion within District 12 of other precincts having a higher percentage of African-Americans and yet to comply with the constitutional requirement of equipopulousness. This movement of more than 31,000 persons "without" District 12 and the movement of a like number "within" District 12, constitutes the placement of "a significant number of voters" in which "race was the predominant factor" and is itself enough to invalidate the district. *See Miller*, 515 U.S. at 917.

State appellants also fail to recognize that the "results" of the three elections as to which the General Assembly was provided information reveal that race *was* used as a proxy for achieving the intended result. *Cf. Vera*, 517 U.S. at 969. They show that in the 1990 election in which Harvey Gantt, an

African-American, ran as the Democratic nominee for the Senate against well-known three-term incumbent Jesse Helms, Gantt obtained 66.49% of the vote in the 1997 plan's District 12. On the other hand, in 1988, when Tony Rand, a white Democrat, ran for Lt. Governor against white Republican Jim Gardner – neither being an incumbent – Rand received only 62.08% of the vote in District 12. In the 1988 State-wide race for the Court of Appeals, John Lewis, the white Democratic candidate, received a majority of only 61.54% in District 12 against the white Republican candidate. These results strongly indicate that – just as the registration data suggests – the "new" District 12 would be safer for an African-American Democratic candidate than for a white Democratic candidate. It would be especially safe for incumbent Melvin Watt, an African-American who had already been elected three times to Congress from the "old" racially gerrymandered Twelfth District.

At the March 31 hearing, appellees submitted that race was the predominant motive not only for District 12 but also for District 1. The shape and demographics of District 1 provide strong support for that contention. Moreover, the legislative history of District 1 indicates that its distorted shape reflects the purpose to create a majority-black district at all costs in order to obtain preclearance and insure the reelection of Representative Eva Clayton, an African-American who had been elected from District 1 under the 1992 plan. Nevertheless, the district court declined to enter summary judgment for the plaintiffs as to District 1. Judge Ervin's dissent finds an inconsistency between the district court's invalidating District 12 and not doing so as to District 1. Whatever the reason for the district court's charitable treatment of District1,[41] the failure to enter summary judgment

---

[41]The district court may have hoped that the legislature, when drawing a new plan, would note some of the concerns expressed by the court as to District 1. If so, its optimism was ill-founded, for the 1998 plan

as to the district is not material evidence of the legislature's motive in drawing District 12.

C. The Affidavits of Legislators of McMahan and Cooper Do Not Create Any Material Issue of Fact.

In their brief, State appellants rely on the affidavits of two legislators, Senator Cooper and Representative McMahan, as grounds for setting aside the summary judgment.[42] This reliance is inconsistent with the contention they made to the district court that a legislator's affidavit is incompetent to show legislative intent.[43] Even assuming arguendo that the affidavits

---

made no change whatsoever in District 1. Had the court determined on motion for summary judgment that District 1 was race-based, an issue of strict scrutiny might have arisen. The State's preclearance submission was perhaps seeking to anticipate that issue when it noted that only in northeastern North Carolina could a geographically compact majority-black district be created. Professor O'Rourke's affidavit questions whether such a district can be created anywhere in North Carolina; and after six years of litigation concerning North Carolina's racial gerrymanders, appellees are still waiting for appellants to produce a map of a majority-black district anywhere in North Carolina that would be "geographically compact."

[42]*See* question 1, St. App. Br. i.

[43]In a brief before the March 31, 1998 hearing, appellants contended that the affidavit of Representative John Weatherly, who served in the General Assembly when the 1997 plan was drawn, was inadmissible:

> to prove the legislature's motivation in enacting the 1997 Congressional plan and must be struck. It is a long standing rule of law in North Carolina that the affidavit or testimony of a member of the legislature may not be relied upon to prove legislative intent. *D & W, Inc. v. City of Charlotte*, 268 N.C. 577, 581-82, 151 S.E.2d 241, 244 (1966). A statute '"is an act of the legislature as an organized body" and it "expresses the collective will of that body" so that the understanding of a single member

of these two legislators are competent,[44] they give no insight into the "collective will" of the General Assembly. Indeed, only statements made by legislators during official legislative sessions or committee meetings merit any consideration in determining the motive for the redistricting plan.

Addressing the North Carolina House of Representatives on March 26, 1997, Representative McMahan, its Redistricting Committee Chairman, explained that the plan was "based on geographic compactness, racial fairness, population that is homogeneously compatible, incumbency friendly, and would divide the fewest number of counties and precincts as possible. The Current Plan divides 45 counties and 80 precincts – new Plan divides 22 counties and only 2 precincts." J.A. 120. He did not mention that, just as the "old" District 12 split all 10 of its counties, the "new" District 12 split six out of six counties, or that District 12 would still be almost at the bottom of the

---

> may not be accepted by the Court to ascertain the legislative intent. *Id. See also Milk Comm'n v. National Food Stores*, 270 N.C. 323, 332-33, 154 S.E.2d 548, 555 (1967) (testimony or affidavits of members of the legislature are not competent evidence of legislative intent and must be disregarded). Because North Carolina law provides that the affidavit of an individual member of the General Assembly is inadmissible and cannot be relied upon to prove legislative intent, the affidavit of Representative Weatherly attempting to establish the legislature's motive in drawing Districts 1 and 12 must be struck. *Empire Distribs. of N.C. v. Schieffelin & Co.*, 679 F. Supp. 541 (W.D.N.C. 1987).

J.A. 145-46.

[44]There is authority that individual legislators are incompetent to testify regarding the intent of the legislative body. *See, e.g., Bread Political Action Comm. v. Fed. Election Comm.*, 455 U.S. 577, 582 n.3 (1982); *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 132 (1974).

nation's districts in "geographical compactness." As to District 12, McMahan explained that because it was no longer majority-minority, its shape was irrelevant in deciding its constitutionality; that the "[p]opulation in 12 has homogeneous interest – comprised of many citizens living in an urban setting"; and that it was "[d]rawn to protect the Democratic incumbent." J.A. 121.

In presenting the redistricting plan to the Senate on March 27, 1997, Senator Cooper, Chair of the Redistricting Committee, noted that the 1992 plan was "a geographic mess" and from maps on the desks of his fellow senators, they "can see how difficult it is for people to know in which congressional district they reside." He contended that the new plan "provides for geographical compactness, provides for consideration of community of interest, and provides for fair partisan balance." J.A. 130-31. Although Cooper thought that "all of the congressional districts would be competitive," he predicted that the plan "would elect six Democrats and six Republicans. We said from the beginning in the Senate that in 1996 the people made a decision to elect six members of Congress from the Democratic party and six members of Congress from the Republican party and we should not use court-ordered redistricting to alter that result." J.A. 131. After expressing his view that the "shape test" would not apply to District 12 because it was no longer majority-black, he observed that the district now was "much more compact." *See* J.A. 132-33. Senator Cooper commented that "we have preserved the current partisan nature of each of the districts and for that reason I think all of the incumbents are satisfied." J.A. 133. Understandably, incumbent Representative Melvin Watt would be "satisfied." The shape of District 12 virtually guaranteed that he would not face any opponents in the primary and that he would have a substantial edge in the general election. Senator Cooper added that "this is not an incumbent protection plan. This is a plan that attempts to

preserve the partisan nature of each of the twelve districts as they now exist." *Id.* This comment seems intended to obfuscate the fact that, in the context of a six-to-six partisan balance in North Carolina's congressional districts, "to preserve the partisan nature" – or "fair partisan balance," *see* J.A. 131 – equates to "incumbent protection."

The language used by Representative McMahan and Senator Cooper on the floor of the General Assembly does not contradict the evidence offered by plaintiffs which clearly established the racial purpose for creating District 12. Representative McMahan specifically stated that this district was drawn to protect the Democratic incumbent. J.A. 121. Since this incumbent was an African-American who had been elected three times from an unconstitutional race-based district and the General Assembly attempted to protect that incumbent by creating an irregularly shaped 46.47% African-American district, McMahan's statements to his fellow legislators actually confirm plaintiffs' case. The same is true of Senator Cooper's statements – although he, unlike Representative McMahan, is an attorney, and he used more artful language both on the floor and in his affidavit.

The references to geographic compactness in the statements by McMahan and Cooper on the floor intimated that this compactness had been achieved. Subsequently, the State's Section 5 submission also indicated that geographic compactness was a feature of the plan and did not mention that North Carolina's District 12 is still one of the least compact in the United States. These misleading statements constitute further admissions by conduct, which are evidence of the intent to mislead others as to the redistricting plan's purpose and to disguise the racial motive.

Especially revealing of legislative intent is the

preclearance submission's account of events that preceded consideration of the 1997 plan by the House of Representatives. Two prominent African-American legislators – Representatives Michaux and Fitch – proposed three alternative redistricting plans, which, in addition to a majority-black district in northeastern North Carolina, contained three "minority influence districts." In discussing the House's rejection of these proposals, the State's own Section 5 submission states:

> all three plans would seriously weaken the ability of the African-American incumbent in District 12 (Congressman Watt) to win re-election. The African-American percentage in District 12 is only 37.66 percent in Plans B and C and 37.44 percent in Plan A --- approximately nine percent lower than the African-American percentage of District 12 in the enacted plan (46.67%).

J.A. 94-95. Significantly, this discussion is in terms of race – not political party.[45] The situation is remarkably similar to that

[45]There is also direct evidence of legislative intent as a result of similar conversations and debates in the General Assembly concerning District 12 in the State's Section 5 submission – which was filed by the State appellants in the district court. For example, Representative McMahan explained his negotiations with Senator Cooper concerning various proposed plans for District 12 in racial – not political – terms when he told his fellow legislators that "we've actually agreed to increase the percent of minorities in District 12 to 46% and are now basically following the Senate plan on District 1 and 12." *See* North Carolina Section 5 Submission 1997 Congressional Redistricting Plan, Vol. 5, Attachment 97C-28F(3) at 3. Linwood Jones, a House staff member working on the 1997 plan, explained a detour into Statesville in racial – not political – terms when he stated: "In Iredell we have gone into Statesville, which I believed picked up the minority percentage of District 12 – we came a little bit more out of southern Rowan when we did that." *Id.*, Attachment 97C-28F-4E(4) at 3-4. Representative McMahan explained a minority candidate's prospects in District 12 in racial – not political – terms when he

in *Vera*, where the legislature's rejection of a more compact district was asserted to be for political reasons at trial, but the explanation for the rejection of the offered plan in the State's Section 5 submission was "in exclusively racial terms." *See* 517 U.S. at 969. The proper inference is that inclusion of a high percentage of African-Americans in the district was important in and of itself. In this context the African-Americans included in District 12 became "mere racial statistics." *Id* at 985. Moreover, the "approximately nine percent" to which the submission refers equates to 50,000 African-Americans – which is a "significant number."

D. The District Court Had No Occasion To Discuss Strict Scrutiny.

Nothing in State appellants' Jurisdictional Statement presented any claim that, after determining that District 12 was race-based, the district court should have provided them an opportunity to prove that the district could survive strict scrutiny. Likewise, the State appellants' brief on the merits makes no such contention. The reason for this omission is obvious. Having asserted that no racial motive existed for the design of District 12, appellants could hardly claim that its strange shape reflected a "compelling governmental interest" or

stated: "As far as District 12 – I believe, again, that Congressman Mel Watt is very comfortable and anyone else that might choose as a minority to run in that district should be very, very comfortable – when there is 46.5% of the people in that District are also minorities – that they could win." *See Id.*, Attachment 97C-28F(1) at 16. Finally, in summarizing the proposed plan to the House Redistricting Committee, Representative McMahan stated: "I am confident that we have done our best - our dead level best - to draw two districts that are fair racially and do have one of them the majority of the population and other one over 46%, and that's the very best we could do on both sides, and we look at this very, very closely – obviously – and the very best we could do and yet create Districts that we felt would be acceptable to the Department of Justice and to the Court." *Id.* at 23.

was the product of "narrow tailoring." Indeed, in claiming that the redistricting plan was primarily for protecting incumbents and maintaining partisan balance, the appellants have made clear that no grounds exist for finding that District 12 could survive strict scrutiny. By their own implied admissions, appellants removed from the case any question as to whether District 12 – having been found race-based – could then pass the test of strict scrutiny.

Furthermore, once plaintiffs proved the predominant racial motive for District 12, the defendants had the burden of producing evidence – and probably the burden of persuasion as well – on issues of "compelling interest" and "narrow tailoring." They produced no such evidence at the hearing, and requested no findings thereon. Appellees question whether the intervenor-appellants or amici have any standing now to complain – after a hearing to which they were not parties – that the district court's Memorandum Opinion made no explicit finding that District 12 failed strict scrutiny. In any event, nothing in this record even remotely suggests that the evidence before the court raised any issue of fact or law as to strict scrutiny.[46] The possible "compelling governmental interests" which are suggested by the intervenor-appellants' brief at 40-41 and by the Lawyers' Committee for Civil Rights Under Law amicus brief at 23-26 are too unrelated to the facts of this case to merit serious consideration. For example, the suggestion that a Section 2 violation might have resulted if the African-Americans in Guilford and Forsyth counties had not been linked with those in Mecklenburg County is implausible in view of the distances and different metropolitan areas involved. Furthermore, like the argument made in this Court concerning District 12's predecessor, any argument that the "new" District 12 is

[46]In his dissent, Judge Ervin does not even intimate that District 12, if race-based, might survive strict scrutiny.

"narrowly tailored" would be "singularly unpersuasive." *See Shaw II*, 517 U.S. at 917.

E. The Summary Judgment Also Was Proper on Other Grounds.

The shape and demographics of the 1992 redistricting plan reflected clearly its dominant race-based purpose. District 12 in that plan obviously was designed to assure the election of an African-American to Congress, just as was District 1. The "packing" of blacks into these two districts had the effect of "bleaching" the other 10 districts and assuring that voters in those districts would elect whites to represent them in Congress. The unspoken assumption was that the two African-American Representatives would represent the blacks of the State and the other ten Representatives would represent the whites. *See Shaw I*, 509 U.S. at 648. In substance, the plan had a racial quota based on North Carolina's 22% African-American population.

After the unconstitutional 1992 plan – which was used for three elections with the anticipated electoral results – had been held unconstitutional, the General Assembly was given the opportunity to prepare a remedial plan.[47] That plan supposedly was to remedy the constitutional defects of its predecessor. However, a simple comparison of the maps showing the 1992 and 1997 plans, J.A. 59a and 61a, reveals that the new plan is not an adequate remedy. Especially with respect to District 12, the resemblance of the "new" to the "old" is too great to be

[47]In this instance, the remedial plan was prepared after a judicial holding that the existing plan was unconstitutional. In *Lawyer*, there had been no judicial determination that the plan being replaced was unconstitutional.

permitted.[48] The plan creates a district in which 46.67% of the population is African-American – even though only 22% of the total population of North Carolina is African-American and they are "relatively dispersed." *Shaw I*, 517 U.S. at 634. District 12 continues to violate traditional districting principles – such as geographical compactness and avoidance of divided political subdivisions. There is no "community of interest" between residents of Charlotte – at the southern extreme of the district – and those in Winston-Salem, Greensboro and High Point – at the northern extreme of the district. Likewise, there is no "community of interest" between residents of these cities and residents of the rural areas that lie between these cities.

It is well recognized that "the historical background" of a legislative decision can be a helpful "evidentiary source" as to the purposes of the decision. *See Arlington Heights*, 429 U.S. at 267. The history of the creation of the "old" District 12 and the statements made in the General Assembly concerning the "incumbent protection" goal of the "new" District 12 generate the presumption that in the 1997 plan this district was formed with a specific purpose of ensuring that an African-American would be elected to Congress. More specifically, the purpose was to ensure that the voters in this district would reelect to Congress Melvin Watt, an African-American who for three terms was elected from the preceding flagrantly gerrymandered District 12.[49] Under these circumstances, the district court could

---

[48]Representative Michaux, in purposing an alternative plan, observed, "all you have done with the 12th District in this bill is knock sixty miles off of it." North Carolina's Section 5 Submission 1997 Congressional Redistricting Plan, Vol. 5, Attachment 97C-28F-4F(1) at 12.

[49]How Representative Watt has performed his duties in Congress during his three terms is irrelevant in the present context and is for voters to decide when and if he runs for office from a properly drawn district. The issue instead concerns the means used to place him, and keep him, in office.

not properly allow the 1997 plan to be used. Even if the court had not found specifically – on the basis of overwhelming and uncontroverted evidence – that the 1997 plan was race-based, the court had a duty to set it aside. Otherwise, the judicial decision declaring the 1992 plan unconstitutional would become only an empty gesture lacking real effect. Obviously this would encourage future evasions of *Shaw v. Reno* by North Carolina – as well as by other states when the next round of redistricting occurs – and it would add to voters' cynicism about both the legislative process and the judicial process.

Representative McMahan and Senator Cooper, the Chairs of the General Assembly's redistricting committees, spoke to their fellow legislators about the goal of preserving the "cores" of the 1992 districts. Retaining the "core" of a district like District 12 that was created with a predominant racial motive is irreconcilable with remedying the replaced district's violation of equal protection rights. The common sense rationale for the "fruit of the poisonous tree" doctrine – a doctrine which this Court has used to protect due process rights in criminal cases – is equally applicable here and would fully justify the entry of summary judgment against District 12, with or without a specific finding as to the race-based motive for its design. As this Court has recognized in *Shaw* and its successor cases, this is one area in which "appearances" are important, because of the perceptions they generate that the legislature is using race as a basis for awarding political offices. Until and unless traditional districting principles are used in redrawing District 12, its "appearance" will continue to generate the perception that it is predominantly race-based. This perception in turn will generate further public distrust of the elections and a lack of interest in an electoral process in which the results appear to be predetermined. Therefore, appellees submit that as a threshold test for approval of a remedial plan, the plan must comply with traditional redistricting principles – regardless of

motive of the legislature. This would facilitate the judicial review of remedial plans and give legislators the guidance which the State appellants have repeatedly claimed to be seeking. The suggested test is not unduly burdensome for, as Justice O'Connor has pointed out, "legislators and district courts nationwide" have already "reembraced the traditional districting practices that were almost universally followed before the 1990 census." *See Vera*, 517 U.S. at 985. The General Assembly deserves no reward for its failure to understand the clear message of *Shaw v. Reno* and for lagging behind in returning to "traditional districting practices."

The legislative history makes clear that District 12 preserved the "core" of an unconstitutional district. Moreover, it violated traditional districting principles and thereby perpetuated the "appearance" of a quota system for representation in Congress. District 12 is the "fruit" of the violations of equal protection in the 1992 plan, rather than a remedy for its constitutional defects. For these reasons, the district court could have properly entered summary judgment without ever engaging in its painstaking examination of the General Assembly's race-based motive.

CONCLUSION

The evidence before the district court was overwhelming and undisputed. The court properly determined that the material facts were uncontroverted and that no issue of fact existed as to the General Assembly's predominant racial motive in configuring District 12. Neither at the March 31 hearing nor on appeal have the State appellants claimed that District 12 could withstand strict scrutiny; and their own evidence establishes conclusively that no "compelling governmental interest" dictated the drawing of this misshaped district. Moreover, the General Assembly's retention of the "core" of the preceding racially

gerrymandered District 12 and its continued rejection of traditional districting principles in configuring the "new" District 12 required the district court to enter summary judgment enjoining use of the 1997 redistricting plan.[50] Therefore, the summary judgment entered by the district court was not in error and should be affirmed.

Respectfully submitted,

Robinson O. Everett*
Everett & Everett
N.C. State Bar No. 1385
P.O. Box 586
Durham, NC 27702
Telephone: (919) 682-5691

Martin B. McGee
Williams, Boger, Grady,
Davis & Tuttle, P.A.
N.C. State Bar No. 22198
Concord, NC 28026-0810
Telephone: (704) 782-1173

*Counsel of Record

December 8, 1998

---

[50]Granting summary judgment in this case – a case in which a remedial plan was enacted after this Court had found the earlier plan to be unconstitutional – is even more appropriate than the granting of the summary judgment in *Diaz v. Silver*, 978 F.Supp. 96 (E.D.N.Y. 1997), *aff'd* 118 S.Ct. 36 (1997).

Supreme Court, U.S.
FILED
DEC 29 1998
OFFICE OF THE CLERK

No. 98-85

In the

Supreme Court of the United States

October Term, 1998

JAMES B. HUNT, JR., *et al.*,

Appellants

and

ALFRED SMALLWOOD, *et al.*,

Intervenor-appellants,

v.

MARTIN CROMARTIE, *et al.*,

Appellees.

On Appeal from the United States District Court
Eastern District of North Carolina

STATE APPELLANTS' REPLY BRIEF ON THE MERITS

MICHAEL F. EASLEY
North Carolina Attorney General

Edwin M. Speas, Jr.,* Chief Deputy Attorney General
Tiare B. Smiley, Special Deputy Attorney General
Melissa L. Saunders, Special Counsel to Attorney General
North Carolina Department of Justice
Post Office Box 629
Raleigh, North Carolina 27602-0629
Telephone: (919) 716-6900

Walter E. Dellinger
Crystal L. Nix
O'Melveny & Myers, LLP
555 13th Street, N.W.
Washington, D.C. 20004
Telephone: (202) 383-5300

December 29, 1998 **Counsel of Record*

TABLE OF CONTENTS

ARGUMENT 1

I. APPELLEES' INSINUATIONS REGARDING THE LEGISLATURE'S MOTIVES ARE UNSUPPORTED, AND REVEAL THAT SUMMARY JUDGMENT FOR APPELLEES WAS IMPROPER 1
A. "Compactness" 3
B. The "Nine Precincts" Not Included in District 12 4
C. "Precinct 77" 9
D. "Legislative Statements" 9
E. "Section 5 Submission" 11

II. THE LEGISLATURE FULLY SATISFIED THE CONSTITUTION BY CURING THE DEFECTS IN ITS 1992 PLAN 12

III. APPELLEES CAN DEFEND THE COURT'S DECISION ONLY BY REWRITING THE TEST OF *SHAW v. RENO* 17

CONCLUSION 20

TABLE OF AUTHORITIES

Page(s)

CASES

Adarand Constructors, Inc. v. Pena,
515 U.S. 200 (1995) 18

Batson v. Kentucky,
476 U.S. 79 (1986) 18

Burns v. Richardson,
384 U.S. 73 (1966) 14

Bush v. Vera,
517 U.S. 952 (1996) 15, 16, 18

Dayton Bd. of Educ. v. Brinkman,
433 U.S. 406 (1977) 14

Freeman v. Pitts,
503 U.S. 467 (1992) 14

Gaffney v. Cummings,
412 U.S. 735 (1973) 16

Johnson v. DeGrandy,
512 U.S. 997 (1994) 16

Lawyer v. Department of Justice,
117 S. Ct. 2186 (1997) 13, 16

McGinnis v. Royster,
410 U.S. 263 (1973) 19

Miller v. Johnson,
515 U.S. 900 (1995) 15

Milliken v. Bradley,
418 U.S. 717 (1974) 14

Missouri v. Jenkins,
515 U.S. 70 (1995) 14

Reynolds v. Sims,
377 U.S. 533 (1964) 4, 8

Shaw v. Hunt,
517 U.S. 899 (1995) 15, 18

Shaw v. Reno,
509 U.S. 630 (1993) . . . . . passim

Swann v. Charlotte-Mecklenburg Bd. of Educ.,
402 U.S. 1 (1971) 14

Upham v. Seamon,
456 U.S. 37 (1982) 13

Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.,
429 U.S. 252 (1977) 17, 18

Washington v. Davis,
426 U.S. 229 (1976) 20

Whitcomb v. Chavis,
403 U.S. 124 (1971) 13

White v. Weiser,
412 U.S. 783 (1973) 13

Wise v. Lipscomb,
437 U.S. 535 (1978) 14

STATUTES

42 U.S.C. § 1973c (1994) 11

OTHER AUTHORITIES

28 C.F.R. § 51.27(n) (1998) 11

28 C.F.R. § 51.28(a)(3) (1998) 11

28 C.F.R. § 51.28(b) (1998) 11

28 C.F.R. § 51.28(d) (1998) 11

Paul Brest, Palmer v. Thompson: *An Approach To The Problem Of Unconstitutional Legislative Motive*, 1971 Sup. Ct. Rev. 95 (1971) 5

Pamela S. Karlan & Daryl J. Levinson, *Reshaping Remedial Measures: The Importance of Political Deliberation and Race-Conscious Redistricting*, 84 Cal. L. Rev. 1201 (July 1996) 19

In accusing appellants of disregarding *Shaw v. Reno*, 509 U.S. 630 (1993), appellees point to the wrong party; it is *appellees*, not the State, who expressly urge this Court to revise *Shaw*.[1] Appellees propose a drastic revision of the "predominance" test applied in *Shaw* and its progeny -- a revision that would eviscerate an entire body of fourteenth and fifteenth amendment jurisprudence and leave numerous state redistricting plans at risk of invalidation.

The State has not asked this Court to overrule or modify *Shaw*. In fact, the State Legislature has fully complied with *Shaw* by using non-racial factors to develop its redistricting plan. Appellees' selective use of the record and inferences drawn from mere appearances do not prove otherwise. In light of appellees' deficient showing on summary judgment that race predominated in District 12's design, the decision below should be reversed.

ARGUMENT

I. APPELLEES' INSINUATIONS REGARDING THE LEGISLATURE'S MOTIVES ARE UNSUPPORTED, AND REVEAL THAT SUMMARY JUDGMENT FOR APPELLEES WAS IMPROPER.

In summarily invalidating a deliberate judgment of the North Carolina General Assembly, the district court held that race was the only *possible* explanation for District 12's design. (*See* Jurisdictional Statement ("JS") at 21a-22a.) This decision -- based on erroneous assumptions and scanty evidence -- reversed the burden of proof required at summary judgment,

---

[1] Even the Table of Contents foreshadows appellees' intent to transform the law. While purporting to "reaffirm[] and give[] full effect" to the principles of *Shaw*, they urge this Court in the same argument section to "conform[] [*Shaw*] to other equal protection precedents" -- precedents that are inapplicable to the redistricting context. (*See* Appellees' Brief ("App. Br."), Table of Contents at I and D.)

and denied the State the opportunity to prove that partisan politics, not race, dominated the district's design.

Attempting to justify this result, appellees insist that the State's publicly declared purpose of furthering partisan political objectives by keeping an equal number of Democrats and Republicans in office was a pretext to conceal a much more nefarious agenda: to advance the interests of African-Americans by packing them into a single district, thereby ensuring the re-election of African-American Congressman Mel Watt. Proof of the Legislature's illicit motives, the Court is told, is revealed through the following:

- District 12 "fails the 'eyeball test' and other well-recognized objective tests of compactness." (App. Br. at 25.)
- Nine predominantly white precincts with heavy Democratic concentrations adjacent to District 12 were "excluded" from the district, belying the legislators' claim that boundaries were drawn based on partisan political data. (*Id.* at 34-36.)
- A single voter in a two-mile area in Precinct 77 was used as a "human link" to join District 9 and Mecklenburg County so that District 12 could avoid dividing them into two, non-contiguous parts. (*Id.* at 30.)
- The architects of the 1997 plan, Senator Cooper and Representative McMahan, were not worried about complying with *Shaw* since they publicly admitted their belief that *Shaw* only applied to majority-minority districts. (*See id.* at 14-15.)
- The State's own Section 5 submission reveals that the State rejected alternative plans because they "would seriously weaken the ability of the African-American

incumbent in District 12 (Congressman Mel Watt) to win re-election." (*Id.* at 42.)

Assuming, for the moment, that these "facts" would permit an inference that racial factors overrode traditional redistricting criteria in violation of *Shaw*, appellees' assertions cannot withstand close scrutiny, and certainly do not satisfy the stringent burden of proof required for summary judgment.

A. "Compactness."

Appellees assert that District 12 fails the "eyeball test" of compactness (App. Br. at 25).[2] The district's shape is, however, easily explained by political and geographic factors. Three such factors stand out, and provide a clear, non-racial motivation for the district's contours. First, the legitimate goal of creating a Democratic district in a largely Republican region of the State cannot be achieved by drawing a circle; the district had to be somewhat elongated, particularly since the medium-size cities in this section of the State -- Charlotte, Greensboro and Winston-Salem -- themselves stretch North and South along the Piedmont Crescent.[3] The district is "thinner" than other districts because it is in a heavily populated area of the State. Second, the Legislature had to draw the district's boundaries in such a way as to preserve not only the Democratic character of District 12 but to protect Republican incumbents, whose hometown areas abut District 12. To satisfy both parties, portions of Winston-Salem and Charlotte were divided between

---

[2] It is noteworthy that the State Legislature, while making significant improvements in District 12's compactness, did not use mathematical compactness as a criterion in redistricting. (*See* Joint Appendix ("J.A.") at 132-33. *See also* State Appellants' Brief on the Merits ("St. Br.") at 6 & n.9.)

[3] In this respect, District 12 is similar to Georgia's Eleventh Congressional District, which was drawn by a three-judge court. (*See* St. Br. at 6 n.8.)

the two parties. Finally, the Legislature sought wherever possible to follow natural boundaries. Certain sections of the district's borders are jagged because the city and township lines they follow are themselves uneven. These race-neutral explanations rebut the inferences appellees draw from District 12's shape.

B. The "Nine Precincts" Not Included in District 12.

Appellees also seek to impugn the State's motives by relying on nine precincts "excluded" from District 12. By their account, these precincts are strong bastions of Democratic support -- certainly as strong as the predominantly African-American precincts included in District 12. According to appellees, there was only one possible reason for leaving them out: they were predominantly white. (*See* App. Br. at 35-36). This assertion is clearly wrong.

One threshold point must be kept in mind in evaluating appellees' charges: every district is limited by population requirements, *see Reynolds v. Sims*, 377 U.S. 533, 568, 579 (1964),[4] and thus boundaries have to be drawn *somewhere*. There will thus always be "excluded" precincts adjoining any district. To demonstrate an equal protection violation, however, appellees must do more than show that certain precincts that *could have been* included in District 12 were not. They must demonstrate that a Legislature pursuing its stated goals could not have drawn the district's boundaries the way it did. In other words, the configuration of the district must be fundamentally at odds with the Legislature's asserted goals, making their race-neutral explanations pretexts to conceal a predominantly race-based agenda. In the absence of such evidence, the legislators' stated goals must be presumed

[4] In North Carolina each district had to maintain population levels of about 552,000 people per district.

truthful.[5] (*See* St. Br. at 26 (discussing cases).) Moreover, even if appellees' precinct evidence were probative, it is limited to *nine out of 120* precincts adjoining District 12. This represents only .075 of the contiguous precincts and an even smaller percentage of precincts in the surrounding area. This isolated "evidence" would be insufficient at trial; it certainly does not satisfy the stringent burden of proof required at summary judgment.[6]

Appellees' specific claim is that nine predominantly white precincts not included in District 12 had Democratic registration rates in the 50-60% range. Of course, since the Legislature based its redistricting plan principally on *actual* voting behavior, rather than party registration data, (*see* St. Br. at 29-34), the State cannot be penalized for deviating from a criterion it did not embrace.[7] But even if the Legislature had, in fact,

[5] *See also* Paul Brest, Palmer v. Thompson: *An Approach To The Problem Of Unconstitutional Legislative Motive*, 1971 Sup. Ct. Rev. 95, 133-34 (1971) ("Judicial review of motivation . . . poses difficulties concerning proof, appropriate relief, and respect for the political processes -- difficulties that are quite different from, and often greater than, those inherent in the nonmotivational modes of review."); *see id.* at 129-30 ("[E]specially where the decisionmaker claims to have pursued only legitimate objectives, a judicial determination of illicit motivation carries an element of insult; it is an attack on the decisionmaker's honesty.").

[6] The district court, perhaps recognizing the weakness of appellees' position, expanded the number of precincts it considered to an additional 23 precincts with Democratic registration rates in the 50-60% range. (*See* JS at 8a-9a.) In doing so, however, the court also relied improperly on party registration data that was neither used by the Legislature nor consistent with a finding of a predominantly race-based motive.

[7] The State Legislature analyzed the results of three elections -- the 1990 United States Senate race, the 1988 Lieutenant Governor race and the 1988 Court of Appeals election -- and concluded that the registration data was unreliable. (*See* 97C-28F-4D(2) at 5-6 (Statement by Sen.

relied on party registration figures to design District 12, such data should have *confirmed* for the district court that race was not the predominant factor in the district's design. These figures demonstrate that virtually all of the contiguous precincts included within District 12 exceeded the Democratic registration figures of the corresponding precincts outside the district -- often by as much as 20% to 30%. The exhibits appellees presented below only substantiate this point. (*See* App. at 11a-13a (using appellees' exhibits N, O and P[8] to show the disparity in Democratic registration inside and outside of District 12).) Since the Legislature wanted to ensure that District 12 remained Democratic, there was no reason to put the district's electoral outcome potentially at risk by substituting precincts with lower Democratic registration rates.

Ultimately, lawmakers found precinct voting patterns dispositive. The fact is that the vast majority of precincts contiguous to District 12, including some of appellees' "excluded" precincts, were not included in the district because the voters were not reliable, election-day Democrats in the three elections the Legislature examined. Indeed, in 83 of the 120 precincts adjoining District 12 (69%), the Republican candidates swept all three elections; in 18 more precincts (15%), the Republicans won two of the three elections, and in

---

Cooper) ("Party registration has little relevance at all to election outcomes. North Carolina is predominately registered Democratic, but if you look at results, it's pretty obvious . . . that many registered Democrats vote Republican.") (the transcripts of all the committee meetings and floor debates are in the court record).) For instance, in 321 of 360 elections in the 120 precincts adjoining District 12 (89%), the percentage of votes received by the Democratic candidates was less than the percentage of registered Democratic voters. (*See* Appendix ("App.") at 1a-7a (showing the results of the three elections in the 120 contiguous precincts not included in District 12).)

[8] Appellees lodged these exhibits with the Court as exhibits 2, 3 and 4. (*See* J.A. at iv.)

six additional precincts (5%), the Republicans won one election.[9] (*See* App. at 1a-7a.) That means that 89% of the contiguous precincts not included in District 12 voted *against* the Democratic candidate in at least one election.[10] Even among the 13 precincts where the Democratic candidate won all three elections, there were clear signs of emerging Republican majorities. In five of those precincts, the Democratic margin of victory in at least one election was less than 3% and in four precincts, it was less than 1%.[11] (*See id.* at 1a-7a.)

Some of the contiguous precincts that voted Democratic were not included in District 12 in order to respect natural boundaries. Since in *Shaw* the Court criticized the irregularity of the district's boundaries, the Legislature sought to respect, rather than traverse, major roads and other natural lines in its

---

[9] Two of the "excluded" precincts appellees cite -- Precincts 21 and 38 in Mecklenburg County -- fall into this category. In both precincts, the Republican candidate won the Court of Appeals race. In Precinct 38, the Republican candidate also won the Lieutenant-Governor race. (*See* App. at 4a.)

[10] The extent of Republican success in the contiguous precincts not included in District 12 is graphically displayed in the Appendix at 8a-10a.

[11] The three Mecklenburg precincts cited by appellees had elections with slim Democratic margins. In Precinct 21, the Democratic candidate for Lieutenant Governor won by only 52.32% of the vote; in Precinct 10, the Democratic Court of Appeals candidate won by only 55.78% of the vote, and in Precinct 38, the Democratic Senatorial candidate won by only 54.33%. (*See* App. at 4a.) This also was true for one of the precincts in Forsyth County, the Latham Elementary School. (*See id.* at 3a.) While all three Mecklenburg County precincts cited by appellees soundly voted for the Democratic Senatorial candidate, this result only had limited probative value since the Democratic candidate had an enormous "home court" advantage as a recent Mayor of the County's largest city, Charlotte.

1997 plan.[12] For this reason, the Legislature drew District 12's boundaries in the northwestern section of Guilford County (containing three "excluded" precincts), along a natural demarcation line -- two major roads, Elm and Lee Streets. (*See* App. at 14a.) Likewise, in the northeastern section of Mecklenburg County (where three other "excluded" precincts are located), the district follows a major road, East Boulevard, west until it reaches South Boulevard, a major north-south thoroughfare in Charlotte, and then follows South Boulevard for miles without interruption. In both cases, the "excluded" precincts fell on the other side of these natural dividing lines.[13] Notably, the Legislature did not include precincts with heavy African-American populations for exactly the same reasons, belying the notion that its actions were racially motivated.[14]

---

[12] District 12 traverses natural boundaries, such as creeks, railroad tracks and rivers, where the lines of a particular precinct cross them.

[13] In Forsyth County, the majority of the district's boundaries follow city lines. Had the Legislature included appellees' precincts along the western boundary, it would have been required to narrow the district in other areas to satisfy the population requirement of *Reynolds v. Sims*, 377 U.S. 533, 568, 579 (1964), which would have made it difficult to follow the city lines on the other side of the district. In addition, the Legislature wanted to protect the base of Republican incumbent Richard Burr, who lives in Winston-Salem, and thus could not allocate all of the precincts in Winston-Salem to District 12.

[14] In Forsyth County, the Legislature did not include three contiguous precincts with African-American populations from 30% to 60%, and in Guilford County, the Legislature did not include an additional such precinct. (*See* App. at 15a.) Ironically, one of the "excluded" precincts appellees highlight, the Hanes Community Center, contained a significant African-American population. As the record shows, 42% of the registered voters in this precinct are African-American. (*See* J.A. at 265.)

C. "Precinct 77."

Appellees' claim that there is a one-person "human link" between District 9 and Mecklenburg County is a red herring. Precinct 77 is an uninhabited industrial area. It is split in local districting plans, and this division has never heretofore been questioned. The reason for the land bridge was political. Neither the Republicans nor the Democrats were willing to concede to the other party all of Charlotte, the hometown of Republican incumbent Sue Myrick and Democratic incumbent Mel Watt. Charlotte had to be split between the parties. Once that division occurred, it made the most sense to connect the remaining portion of land, which housed a large segment of Republicans, to District 9. Precinct 77 was used to effect this bridge.[15]

D. "Legislative Statements."

Appellees take the public statements of Senator Cooper and Representative McMahan out of context. While it is true that these legislators expressed some doubt as to whether *Shaw* applied to districts that were not majority-minority, both lawmakers made clear that the Legislature sought to ensure that District 12 complied with constitutional norms. Indeed, immediately after the portion selectively quoted in appellees' brief, Cooper provided a number of reasons why the district would satisfy *Shaw*. (*See* J.A. at 132.)[16] McMahan also took

---

[15] The "sole" voter who purportedly joined District 9 and Mecklenburg County and who would be unable to cast a ballot in secret (App. Br. at 30 & n.37.) moved away from her home on Nations Ford Road in 1993 -- the last holdout in an area that long ago had become an industrial park. She has since passed away.

[16] (*See also* 97C-28F-4D(2) at 2 (Statement By Sen. Cooper) ("The bottom line interpretation is that race cannot be the predominate factor in redistricting and that if race is used, districts must be reasonably compact.").)

pains to demonstrate the State's compliance with *Shaw*. (*See* J.A. at 121 (discussing District 12's compactness, community of interest and ability to protect the Democratic incumbent).) These are not the words of lawmakers unconcerned with satisfying *Shaw*.

Appellees expressly concede that "statements made by legislators during official legislative sessions or committee meetings merit . . . consideration in determining the motive for the redistricting plan." (App. Br. at 39.) The affidavits of Cooper and McMahan clearly fall within these bounds since they accurately synthesize their statements on the General Assembly floor. (*Compare* J.A. at 131, 133 (Cooper) and J.A. at 120-21 (McMahan) *with* JS at 73a-74a (Cooper Aff. ¶¶ 8-9) and JS at 81a-82a (McMahan Aff. ¶ 7) (stating that the redistricting plan was intended to preserve the existing electoral balance).)[17] In any case, even the record citations offered by appellees confirm that the State's redistricting plan was motivated predominantly by political, not racial, considerations. For instance, appellees reference a statement by Senator Cooper that "*[t]his is a plan that attempts to preserve the partisan nature of each of the twelve districts as they now exist.*" (App. Br. at 40-41 (quoting J.A. at 133) (emphasis added).) (*See also id.* at 40 ("We said *from the beginning in the Senate* that in 1996 the people made a decision *to elect six members of Congress from the Democratic party and six members of Congress from the Republican party* . . . . ") (quoting J.A. at 131 (emphasis added)).) These statements confirm what the

[17] There also is no merit to appellees' claim that the floor debates reveal the Legislature's race-based motives. (*See* App. Br. at 42 n.45.) For instance, appellees neglect to point out either that McMahan was responding to a question by an African-American representative about the plan's impact on minorities or that he then emphasized that "we've done our very, very best considering . . . the Court's ruling" and "that we were instructed by the Court not to depend solely on race." (97C-28F-4F(1) at 16.)

Legislature has stated all along: its overarching goal was to preserve the existing electoral balance.

E. "Section 5 Submission."

Appellees also completely mischaracterize the State's Section 5 submission. Prior to the statement quoted in appellees' brief (*see* App. Br. at 42), the State made clear that the three alternative plans discussed failed to further the Legislature's partisan agenda.[18] Moreover, there is nothing surreptitious about the State's discussion of the impact its redistricting plan would have on minorities. The State was merely following its obligation under the Voting Rights Act to obtain preclearance for any change in voting procedure -- a process that required the State to show that its redistricting plan would "not have the purpose [or] effect of denying or abridging the right to vote on account of race or color." 42 U.S.C. § 1973c (1994). Appellees' assertion that the State's unlawful racial agenda is exposed because "[s]ignificantly this [Section 5] discussion is in terms of race -- not political party," is dumbfounding. (App. Br. at 42.) *Of course*, the State's discussion was oriented toward race; race, not politics, governs a Section 5 analysis. The State's submission demonstrates nothing more than that it complied with Justice Department regulations, which require a variety of racial information.[19]

[18] (*See* J.A. at 94 ("Representative Michaux's amendments were rejected because they did not preserve the partisan balance in House Bill 586 . . . . Plan B would have placed two Democratic incumbents in the same district . . . . All three plans . . . would have placed two Republican incumbents together in District 6 . . . .").)

[19] *See, e.g.*, 28 C.F.R. § 51.27(n) (1998) (requiring a discussion of the "anticipated effect of the change on members of racial or language minority groups"); *id.* § 51.28(b) (1998) (requiring maps showing the location of racial and language minority groups); *id.* § 51.28(a)(3) (1998) (requiring estimated population data, "by race and language group," made in connection with the adoption of the change); *id.* § 51.28(d)(2),

In short, appellees failed to establish before the district court that the design of District 12 was motivated predominantly by race and that traditional redistricting criteria were subordinated. The decision below must therefore be reversed.

II. THE LEGISLATURE FULLY SATISFIED THE CONSTITUTION BY CURING THE DEFECTS IN ITS 1992 PLAN.

Appellees' recitation of the law is as unpersuasive as their account of the "facts." They claim that the Legislature's 1997 redistricting plan should be struck down because it used its invalidated 1992 plan as the touchstone for its new design, rather than "the 1982 redistricting plan, which had not been tainted by a predominant racial motive." (App. Br. at 22.) In support of this novel position, they trumpet language in school desegregation cases mandating the elimination of "all vestiges of state-imposed segregation," and in fourth amendment cases denying access to improperly obtained evidence as the "fruit of the poisonous tree." (*Id.* at 21.) Appellees' reliance on these precedents is completely off-base. Nowhere do these cases compel a state seeking to remedy its prior unconstitutional acts to scrap its entire system when a more narrowly tailored approach would cure its constitutional violations.

In seeking to develop a plan that would pass constitutional muster, the Legislature did what other courts and legislatures had done: retained the core of its prior redistricting plan, and took those steps necessary to correct the constitutional violations. Even with this conservative approach, however, the State made dramatic changes: District 12 retained less than 70 percent of its original population and only 41.6% of its original

(6) (1998) (requiring race-based electoral data). (*See also* JS at 63a-67a and J.A. at 89-110 (portions of the State's Section 5 Submission.)

geographic area, increasing its geographic compactness significantly. (*See* St. Br. at 5.)

Appellees' condemnation of this approach betrays a fundamental misunderstanding of the Court's precedents. In case after case, this Court not only has permitted, but instructed, lower courts to design redistricting plans exactly the way North Carolina's legislature did. The mandate then and now is clear: make only those changes necessary to cure the defect. *Upham v. Seamon*, 456 U.S. 37, 43 (1982) (per curiam). Indeed, in its most recent redistricting decision, *Lawyer v. Department of Justice*, 117 S. Ct. 2186 (1997), the Court approved a revised redistricting plan that retained a significant portion of the State's prior plan, including irregularities in shape and a significant number of minority voters within a particular district. *See id.* at 2191, 2193-95. Nowhere did the Court suggest that the revised plan was tainted simply by its similarity to the prior plan.

Indeed, where court-drawn redistricting plans have exceeded the scope of the constitutional violation, this Court has not been hesitant to strike them down. *See, e.g., White v. Weiser*, 412 U.S. 783, 793-94, 797 (1973) (reversing a district court's decision not to use a reapportionment plan that most closely approximated the State's prior plan, while curing the constitutional defects); *Whitcomb v. Chavis*, 403 U.S. 124, 160-61 (1971) (reversing district court plan that failed to approximate the legislature's original policy choices).[20] Since

[20] Use of the 1982 plan would be both impracticable and severely injurious to the State's legitimate race-neutral interests. The 1982 plan contained only eleven congressional districts, while the State's current apportionment is twelve. The 1982 plan would thus have to be overhauled to account for a whole new district. Moreover, the creation of a Democratic voting district in the populous Piedmont Urban Crescent in the 1990s helped to create a partisan electoral balance, which would be undermined by a return to the 1982 plan. In addition, an attempt to return to the 1982 plan would disrupt relations between constituents and

a federal court is obligated to retain as much as possible of a prior legislative plan, while curing the constitutional defects, it is axiomatic that a state legislature that adopts the same approach acts consistent with constitutional norms. *See Wise v. Lipscomb*, 437 U.S. 535, 540 (1978) ("[A] State's freedom of choice to devise substitutes for an apportionment plan found unconstitutional, either as a whole or in part, should not be restricted beyond the clear commands of the Equal Protection Clause.") (quoting *Burns v. Richardson*, 384 U.S. 73, 85 (1966)).

The Court's school desegregation cases, on which appellees also rely, only confirm the validity of the Legislature's actions. Like the redistricting cases, these precedents make clear that "the scope of the remedy [must be] determined by the nature and extent of the constitutional violation." *Milliken v. Bradley*, 418 U.S. 717, 744 (1974).[21] *See also Missouri v. Jenkins*, 515 U.S. 70, 88-89 (1995); *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 16 (1971).[22] The Court's remedial cases are premised on the understanding that a remedial plan must relate precisely to "the *condition* alleged to offend the Constitution." *Jenkins*, 515 U.S. at 88 (emphasis added). Thus, the State's 1997 plan must be evaluated against the specific harms caused by its 1992 plan.

politicians and frustrate the State's goal of maintaining incumbent representatives with seniority.

[21] For instance, in *Dayton Board of Education v. Brinkman*, the Court insisted on "a geometric congruence of right and remedy." 433 U.S. 406, 420 (1977). Vacating a sweeping desegregation decree in Dayton's school system, the Court instructed the district court on remand to "determine how much incremental segregative effect [the school board's] violations had on the racial distribution of the Dayton school population as presently constituted, when that distribution is compared to what it would have been in the absence of such constitutional violations." *Id.* "The remedy," the Court emphasized, "must be designed to redress that difference." *Id. See also Freeman v. Pitts*, 503 U.S. 467, 492 (1992) (examining whether the constitutional violator "has complied in good faith with the desegregation decree since it was entered, and whether the vestiges of past discrimination ha[ve] been eliminated to the extent practicable").

At base, the "condition" that required curing was the use of race as the controlling factor in the design of District 12. *See Shaw v. Hunt*, 517 U.S. 899, 905 (1996) (the constitutional wrong occurs when race becomes the "dominant and controlling" consideration); *see also Miller v. Johnson*, 515 U.S. 900, 913 (1995) (same). The State's violation was, in essence, the very act of making race the defining feature of the district's design. This excessive use of race, the Court held, created three constitutional harms: the "expressive" harm of "convey[ing] the message that political identity is, or should be, predominantly racial," *Bush v. Vera*, 517 U.S. 952, 980 (1996) (plurality opinion); the "representational" harm of causing elected officials to "believe that their primary obligation is to represent only the members of that group, rather than their constituency as a whole," *Shaw v. Reno*, 509 U.S. at 648 (1993), and the societal harm of "balkaniz[ing] us into competing racial factions." *Id.* at 657. (*See also* St. Br. at 39.)

The constitutional violation and the resulting harms were extinguished by the State Legislature's 1997 plan. First, as indicated above, the Legislature abandoned race as the predominant factor in its redistricting plan, and drew boundaries based on partisan political data. This was true not

[22] The Court's previous cases also refute appellees' claim that the State must bear the burden of disproving that its 1997 plan is unconstitutional. *See, e.g., Shaw v. Hunt*, 517 U.S. 899, 905 (1995).

only in District 12 but throughout the State.[23] The State's elevation of partisanship over race eliminated the prior "expressive" harm "that political identity is, or should be, predominantly racial." *Bush*, 517 U.S. at 980. (*See also* St. Br. at 39.) If anything, voters were left with the clear message that what matters above all is how they vote, not the way they look.

Second, by focusing on political, rather than racial characteristics, the 1997 plan extinguished District 12's majority-minority character and created a competitive, multi-racial environment in which the *entire* electorate must "pull, haul, and trade to find common political ground." *Johnson v. DeGrandy*, 512 U.S. 997, 1020 (1994). While the Court has never held that majority-minority districts are presumptively unconstitutional, *see Shaw*, 509 U.S. at 642, their absence creates a strong inference that race was not elevated above other, race-neutral factors. *See Lawyer*, 117 S. Ct. at 2195 ("[t]he fact that [a challenged district] is not a majority-black district . . . supports" a decision not to subject the district to strict scrutiny). Indeed, the transformation of District 12 not only erased any previous implied racial classifications, but eliminated the "representational" harm of causing candidates and elected officials to believe that their obligations were limited to any "particular racial group, rather than their constituency as a whole." *Shaw*, 509 U.S. at 648. *See Lawyer*, 117 S. Ct. at 2195 (a multiracial district "'offers to any candidate, without regard to race, the opportunity' to seek and be elected to office."). (*See also* St. Br. at 39.)[24]

---

[23] It bears mentioning that this Court consistently has upheld political gerrymanders under the Equal Protection Clause. *See, e.g., Gaffney v. Cummings*, 412 U.S. 735, 751 (1973).

[24] (*See* Brief *Amici Curiae* of Congresswoman Corrine Brown, Congressman John Lewis, Congresswoman Cynthia McKinney and the Democratic Congressional Campaign Committee Supporting Appellants ("Brown Br.") at 2-3, 18-19.)

Third, as amici Congresswoman Corrine Brown, *et al.*, have pointed out, the State drew district boundaries using race-neutral precinct lines.[25] Unlike all of the other redistricting plans this Court has invalidated,[26] the State did not use the smaller, geographic unit of census blocks, which contain only population and racial statistics. As units the size of street blocks, census blocks can easily be manipulated to further racial agendas.[27] The State's decision to use precincts, rather than census blocks, made it easier to group voters based on shared political interests expressed through voting behavior, rather than racial identity.[28] Their reliance on a race-neutral organizing principle ensured that voters would not be "balkanize[d] . . . into competing racial factions," *Shaw*, 509 U.S. at 657.

III. APPELLEES CAN DEFEND THE COURT'S DECISION ONLY BY REWRITING THE TEST OF *SHAW v. RENO*.

Despite the Court's consistent application of the predominance test in redistricting cases, appellees urge the Court to reject it in favor of an entirely different standard utilized in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 265-66 (1977), to address claims of invidious discrimination. (*See* App. Br. at 19-20.)

---

[25] (*See* Brown Br. at 14-18.)

[26] (*See id.* at 13 & n.8.)

[27] *See Bush*, 517 U.S. at 961-64, 966-67, 973-76 (plurality opinion). (*See also* Brown Br. at 12-13.)

[28] Census tract data, which follow easily identified natural or man-made lines such as streets, roads and highways, also is an acceptable, race-neutral method of drawing boundary lines. (*See* Brown Br. at 12-18.) In North Carolina, precinct lines comported with census tracts.

Appellees' eagerness to fundamentally transform the Court's jurisprudence betrays an implicit recognition that application of the predominance test, alone, is insufficient to invalidate the 1997 plan. But the alternative they offer up -- a transposition of the *Arlington Heights* test -- would require redistricting plans to be struck down not because race was the predominant factor in the district's design, but if race was simply "*a* motivating factor." *Arlington Heights*, 429 U.S. at 265 (emphasis added). Once a plaintiff could demonstrate any consideration of race, the burden would then "shift[] to the law's defenders to demonstrate that the [plan] would have been enacted without this factor." (App. Br. at 19-20.)

Appellees' transparent effort to rewrite *Shaw* should be squarely rejected. In the redistricting context, the Court has never treated any trace of race as a carcinogen. *See Shaw*, 509 U.S. at 642 (emphasizing that the Court "never has held that race-conscious state decision-making is impermissible in *all* circumstances"); *Bush*, 517 U.S. at 958 (plurality opinion) (strict scrutiny "does not apply to all cases of intentional creation of majority-minority districts"). That is because the harms identified in the Court's previous cases, *see supra* at 14, are present only "when race becomes the 'dominant and controlling' consideration" in redistricting. *Shaw v. Hunt*, 517 U.S. at 905. Only through the excessive use of race are voters stigmatized or divided into racial factions or legislators sent the message that they need not represent the constituency as a whole.[29] *See Shaw*, 509 U.S. at 647-48, 657.

---

[29] *See also Shaw v. Hunt*, 517 U.S. at 931 (Stevens, J., dissenting): Unlike many situations in which consideration of race itself necessarily gives rise to constitutional suspicion, see, *e.g.*, *Batson v. Kentucky*, 476 U.S. 79 (1986); *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995), our precedents have sensibly recognized that in the context of redistricting a plaintiff must demonstrate that race had been used in a particularly determinative manner before strict constitutional scrutiny should obtain.

Moreover, as a practical matter, it is simply not feasible to create a completely "color-blind" redistricting process. *See Shaw*, 509 U.S. at 646 (recognizing that "redistricting differs from other kinds of state decisionmaking" since the legislature "always is aware of race when it draws district lines, just as it is aware of age, economic status, religious and political persuasion, and a variety of other demographic factors"). A requirement that a State demonstrate that a redistricting plan would have been enacted without *any* consideration of race would place countless state redistricting plans at risk. *See McGinnis v. Royster*, 410 U.S. 263, 276-77 (1973) ("[T]he removal of even a 'subordinate' purpose may shift altogether the consensus of legislative judgment supporting the statute.") As two scholars have noted:

> If the *Arlington Heights* test were applied straightforwardly, the state would virtually never be able to defend a plan from invalidation, since it is hard to imagine how it could ever show that the legislature would have adopted precisely the same plan had it been entirely unaware of the racial distribution of voters.[30]

The test set out in *Shaw* and its progeny adequately checks improper racial classifications while respecting state processes and the political realities in which redistricting decisions are made.

As if appellees' attempt to persuade the Court drastically to revise *Shaw* were not enough, they urge the invalidation of the State's plan as the "fruit of the poisonous tree" even without "a specific finding as to the race-based motive for [the district's] design." (App. Br. at 47.) Not only would such a result patently contravene established case law, but it would make it exceedingly difficult for States whose plans had once

---

[30] Pamela S. Karlan & Daryl J. Levinson, *Reshaping Remedial Measures: The Importance of Political Deliberation and Race-Conscious Redistricting*, 84 Cal. L. Rev. 1201, 1214 (July 1996).

been struck down to enact a revised plan that could survive fresh judicial review. Appellees' approach could have the effect of permitting a court to uphold a plan offered by a state *ab initio*, and to reject the identical plan if drawn by a previous constitutional offender. Since federal courts are admonished to respect prior legislative plans once constitutional violations have been cured, giving state legislatures less freedom than courts are accorded would create a *perverse incentive for legislatures to forego enacting any plan and simply turn remedial redistricting over to the federal courts*.

Ultimately, appellees' position reduces to a single claim: District 12 is racially imbalanced. In so arguing, appellees rely on an "effects" test that was repudiated in *Washington v. Davis*, 426 U.S. 229, 240 (1976) (invidious discrimination "must ultimately be traced to a racially discriminatory purpose"). Far from meeting their heavy burden of proof at summary judgment, appellees failed to offer credible evidence that District 12's design was "'unexplainable on grounds other than race.'" *Shaw*, 509 U.S. at 644. The decision below should therefore be reversed.

CONCLUSION

For the reasons stated, the Court should reverse the grant of summary judgment to appellees and remand for entry of judgment in favor of the State or, in the alternative, remand for trial.

Respectfully submitted,

MICHAEL F. EASLEY
North Carolina Attorney General

Edwin M. Speas, Jr.*
Chief Deputy Attorney General

Tiare B. Smiley
Special Deputy Attorney General

Melissa L. Saunders
Special Counsel to Attorney General

Walter E. Dellinger
O'Melveny & Myers LLP

Crystal L. Nix
O'Melveny & Myers LLP

December 29, 1998

*Counsel of Record

APPENDIX

INDEX OF APPENDICES

Table of Republican Victories in Precincts Abutting District 12 . . . . . 1a

Republican Victories Maps
- Mecklenburg/Cabarrus County Precincts Abutting District 12 . . . . . 8a
- Forsyth County Precincts Abutting District 12 . . . . . 9a
- Guilford County Precincts Abutting District 12 . . . . . 10a

Precinct Registration Maps
- Mecklenburg County District 12 Precincts 11a
- Forsyth County District 12 Precincts 12a
- Guilford County District 12 Precincts 13a

Guilford County Precincts "Excluded" by Elm & Lee Streets 14a

Forsyth County African-American "Excluded" Precincts 15a

TABLE OF REPUBLICAN VICTORIES IN PRECINCTS ABUTTING DISTRICT 12

Precinct No./Name	% Dem. Reg.	% Dem. U.S. Senate 1990	% Dem. Lt. Gov. 1988	% Dem. Ct. of Appeals 1988	Number of Republican Victories
GUILFORD COUNTY Precincts Abutting District 12					
1103 Jamestown-3	39.64	16.48	27.11	25.80	**3**
0221 HP-21	45.10	38.35	38.51	35.36	**3**
0218 HP-18	47.98	27.16	32.20	32.84	**3**
0214 HP-14	55.73	27.53	37.56	40.38	**3**
0204 HP-04	45.74	33.96	40.55	32.26	**3**
0209 HP-09	55.29	38.87	46.81	45.30	**3**
0217 HP-17	53.03	47.42	46.88	43.61	**3**
0220 HP-20	41.43	39.12	36.06	29.73	**3**
0223 HP-23	42.89	37.27	36.67	32.07	**3**
0802 Friendship-2	51.13	31.34	38.64	33.55	**3**
3124 GB-24C	32.86	56.56	47.92	43.58	2
0122 GB-22	52.08	55.40	48.58	43.22	2
0143 GB-43	51.76	56.42	47.04	43.81	2
0123† GB-23	59.68	50.59	51.95	51.38	0
0117†• GB-17	61.86	65.08	61.68	58.19	0
0114†• GB-14	58.14	86.91	65.66	63.92	0
0111†• GB-11	62.32	67.51	61.68	52.98	0
0112† GB-12	60.21	43.62	52.73	34.81	2
0128† GB-28	56.74	44.34	50.78	39.31	2

Precinct No./Name	% Dem. Reg.	% Dem. U.S. Senate 1990	% Dem. Lt. Gov. 1988	% Dem. Ct. of Appeals 1988	Number of Republican Victories
GUILFORD COUNTY Cont....					
2135 GB-35B	43.54	46.81	48.87	38.09	3
3135 † GB-35C	66.22	66.40	49.01	38.13	2
1402 † South Monroe	57.27	32.72	42.73	42.51	3
1602 South Sumner	47.99	19.18	33.33	28.64	3
1202 † South Jefferson	63.29	45.76	53.37	52.26	1
0702 Fentress-2	51.94	27.77	37.41	32.14	3
1201 † North Jefferson	55.17	31.19	45.19	45.51	3
0208 HP-08	44.79	36.44	39.19	33.16	3

FORSYTH COUNTY Precincts Abutting District 12					
0303 † Bethania #3	56.78	33.83	40.66	42.45	3
0401 Broadbay #1	52.22	28.6[illegible]	38.02	37.37	3
0603 Kernersville #3	40.94	33.21	33.76	31.19	3
0801 † Middlefork #2	60.11	44.57	46.51	48.23	3
0802 † Middlefork #3	55.84	36.76	39.94	42.98	3
1436 † New Hope United Methodist Church	55.91	57.04	53.06	52.56	0
1407 Brown/Douglas Recreation	61.60	78.27	64.07	62.39	0
1403 † Bethabara Moravian Church	55.06	52.12	53.14	50.21	0
1422 † • Hanes Community Center	76.	75.77	71.68	69.18	0
1408 † • Brunson Elementary School	65.75	75.46	66.30	65.84	0

Precinct No./Name	% Dem. Reg.	% Dem. U.S. Senate 1990	% Dem. Lt. Gov. 1988	% Dem. Ct. of Appeals 1988	Number of Republican Victories
FORSYTH COUNTY Cont....					
1443 Reynolds High School Gym	57.38	58.15	54.42	50.51	0
1411 Christ Moravian Church	51.53	59.37	49.93	47.72	2
1427 † • Latham Elementary School	65.25	54.85	53.86	55.87	0
1441 † Philo Middle School	57.37	28.29	39.60	44.23	3
1413 Covenant Presbyterian Church	50.77	31.07	43.05	47.68	3
0102 Abbots Creek #2	38.27	22.38	29.84	29.00	3
1202 South Fork #2	48.69	27.63	34.24	34.17	3
0503 Clemmonsville #3	37.58	34.75	32.78	29.65	3
1202 South Fork #2	48.69	27.63	34.24	34.17	3
0102 Abbots Creek #2	38.27	22.38	29.84	29.00	3
0503 Clemmonsville #3	37.58	34.75	32.78	29.65	3

MECKLENBURG COUNTY Precincts Abutting District 12					
0601 CO 1	51.26	49.43	42.26	37.13	3
0104 † Ch. Pct. 4	54.50	51.76	42.12	38.16	2
0195 Ch. Pct. 95	50.46	60.77	48.04	43.44	2
0184 Ch. Pct. 84	53.44	64.22	48.15	46.57	2
0145 † Ch. Pct. 45	59.10	47.60	45.30	42.05	3
0105 Ch. Pct. 5	57.03	60.45	50.35	47.62	1
0133 † Ch. Pct. 33	55.72	51.07	43.87	38.67	2

Precinct No./Name		% Dem. Reg.	% Dem. U.S. Senate 1990	% Dem. Lt. Gov. 1988	% Dem. Ct. of Appeals 1988	Number of Republican Victories
MECKLENBURG COUNTY Cont....						
0134 †	Ch. Pct. 34	54.60	49.01	46.19	44.87	3
0107 †	Ch. Pct. 7	54.27	61.88	52.61	49.08	1
0135	Ch. Pct. 35	53.14	59.88	49.41	38.19	2
0147	Ch. Pct. 47	49.57	47.03	40.70	27.37	3
0118	Ch. Pct. 18	47.78	46.80	42.73	27.24	3
0101	Ch. Pct. 1	51.30	57.77	45.27	35.41	2
0108	Ch. Pct. 8	49.01	50.28	42.54	28.55	2
0120	Ch. Pct. 20	55.02	56.40	49.69	38.10	2
0110 † •	Ch. Pct. 10	63.45	73.01	62.66	55.78	0
0121 † •	Ch. Pct. 21	59.45	60.11	52.32	48.30	1
0151	Ch. Pct. 51	51.66	54.90	43.68	38.14	2
0138 •	Ch. Pct. 38	51.82	54.33	44.95	40.67	2
0137	Ch. Pct. 37	53.37	47.81	41.89	37.79	3
0150	Ch. Pct. 50	51.18	48.89	39.27	36.21	3
0159	Ch. Pct. 59	50.65	50.57	38.01	34.23	2
0158	Ch. Pct. 58	49.09	49.69	42.68	38.73	3
0176	Ch. Pct. 76	36.61	46.59	34.85	24.45	3
0192	Ch. Pct. 92	28.29	49.40	32.38	22.44	3
1601	PVL	40.83	48.38	34.25	28.40	3
1801	SC 1	51.87	47.50	48.91	36.66	3
0301 †	BER	58.82	42.90	45.58	42.97	3

Precinct No./Name		% Dem. Reg.	% Dem. U.S. Senate 1990	% Dem. Lt. Gov. 1988	% Dem. Ct. of Appeals 1988	Number of Republican Victories
MECKLENBURG COUNTY Cont....						
0179 †	Ch. Pct. 79	56.46	42.25	42.96	40.49	3
0180	Ch. Pct. 80	52.37	47.40	42.18	39.11	3
0189 †	Ch. Pct. 89	54.21	25.37	31.71	28.49	3
1401 †	OAK	59.14	30.23	26.56	34.42	3
1501	PC1	49.00	33.04	31.03	27.44	3
1001 †	LC1- North	59.22	45.18	46.65	44.74	3
0901	LEM	43.99	41.87	34.20	26.16	3

RANDOLPH COUNTY Precinct Bordering DAVIDSON and GUILFORD COUNTIES Portions of District 12						
0414	Prospect	32.02	20.64	23.14	21.02	3

DAVIDSON COUNTY Precincts Bordering District 12						
0601	Cotton	62.71	46.32	60.36	60.60	1
1110	Ward No.6	69.17	50.71	60.36	60.56	0
0502	Holly Grove	49.27	28.96	37.97	37.96	3
1101	Lexington No.1	50.68	29.94	40.98	40.63	3
1102	Lexington No.2	55.17	37.98	44.92	43.32	3
1111	Welcome	48.85	27.03	37.15	35.49	3
1606	Thomasville No.7	41.23	20.56	33.19	29.74	3
1604	Thomasville No.4	52.39	32.71	43.27	42.69	3

Precinct No./Name		% Dem. Reg.	% Dem. U.S. Senate 1990	% Dem. Lt. Gov. 1988	% Dem. Ct. of Appeals 1988	Number of Republican Victories
DAVIDSON COUNTY Cont....						
1605	Thomasville No.5	52.30	29.17	39.88	36.99	3

ROWAN COUNTY Precincts Bordering District 12						
1106	Trading Ford	57.98	37.12	47.26	46.15	3
1103	Hatters Shop	44.68	30.91	37.26	33.10	3
1102	Granite Quarry	46.99	40.13	41.65	38.80	3
0602	Faith	40.53	31.29	37.82	33.82	3
0702	Sumner	47.40	32.83	36.82	33.77	3
1114	West Ward II	57.71	42.66	47.17	48.17	3
0701	Locke	42.58	35.67	37.95	33.56	3
1104	Milford Hills	53.05	48.32	47.27	44.70	3
1301	Steele	47.37	33.18	41.43	37.88	3
0901	Mt. Ulla	55.53	36.42	43.61	44.41	3
0101	Bradshaw	48.86	29.03	38.39	34.86	3
0102	Enochville	43.86	20.78	32.37	28.87	3

IREDELL COUNTY Precincts Bordering District 12						
1501	Turnersburg	64.21	44.36	50.19	56.46	1
1101	Olin	53.69	24.60	34.50	35.10	3
0201	Bethany	51.38	33.03	30.82	34.17	3
1401	Statesville #1	61.40	41.90	38.84	41.89	3

Precinct No./Name		% Dem. Reg.	% Dem. U.S. Senate 1990	% Dem. Lt. Gov. 1988	% Dem. Ct. of Appeals 1988	Number of Republican Victories
IREDELL COUNTY Cont....						
1402	Statesville #2	55.90	41.60	38.44	39.70	3
1404	Statesville #4	62.39	44.38	43.01	46.41	3
1405	Statesville #5	62.06	40.30	40.88	43.46	3
1301	Shiloh	61.07	31.83	37.14	41.77	3
0901	Fallstown	58.82	38.25	35.12	37.69	3
0701	Davidson	46.05	36.45	32.07	29.96	3

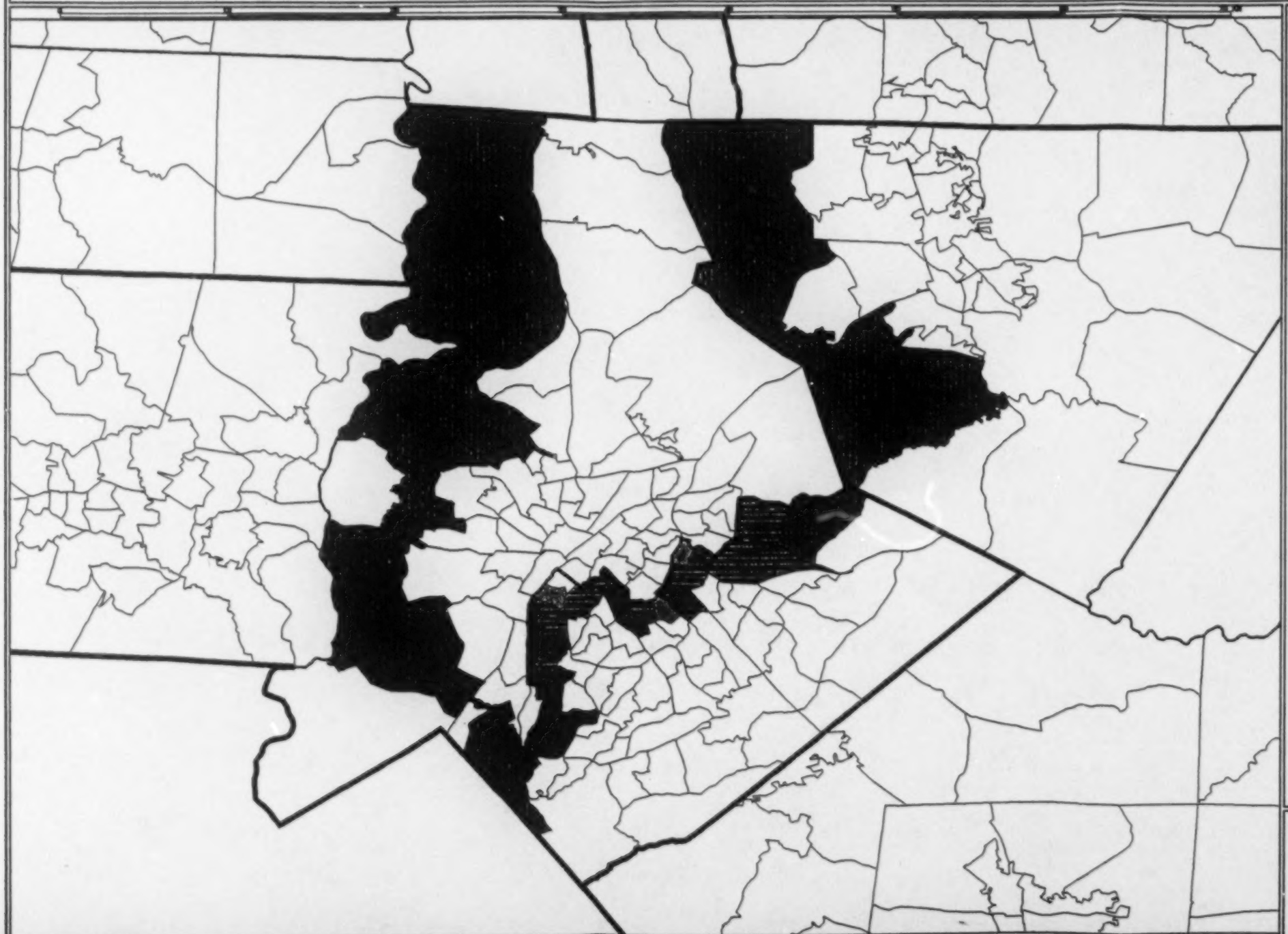
CABARRUS COUNTY Precincts Bordering District 12						
0301	Township 3	49.73	31.54	40.28	37.20	3
0204	Township 2 Box 4	37.80	33.20	36.84	34.17	3
0203	Township 2 Box 3	41.68	32.48	36.75	34.26	3
0103	Township 1 Box 3	49.59	30.89	37.69	36.64	3
0101	Township 1 Box 1	42.37	42.03	36.43	33.00	3

† Precincts cited by district court (JS at 8a - 9a)
• Precincts cited in McGee Affidavit (JA at 257-76)

NOTES: The data in this Table includes: (a) 1990 Democratic voter registration data; (b) 1990 Gant-Helms U.S. Senate election results; (c) 1988 Rand-Gardner Lt. Governor election results; and (d) 1988 Lewis-Smith Court of Appeals election results. The data is provided for each precinct abutting District 12, except for that portion of the District boundary which is coterminous with Davie County and for which no precinct level data is available in the data base.

SOURCE: The data in this Table is from the North Carolina General Assembly's redistricting computer data base, the same source of the data relied on in the affidavit of Martin B. McGee.

Republican Victories in Mecklenburg/Cabarrus County Precincts Abutting District 12



LEGEND

- County Boundary
- [illegible] Boundary
- Dist. Boundary (H93)
- Dist. Boundary (C004)

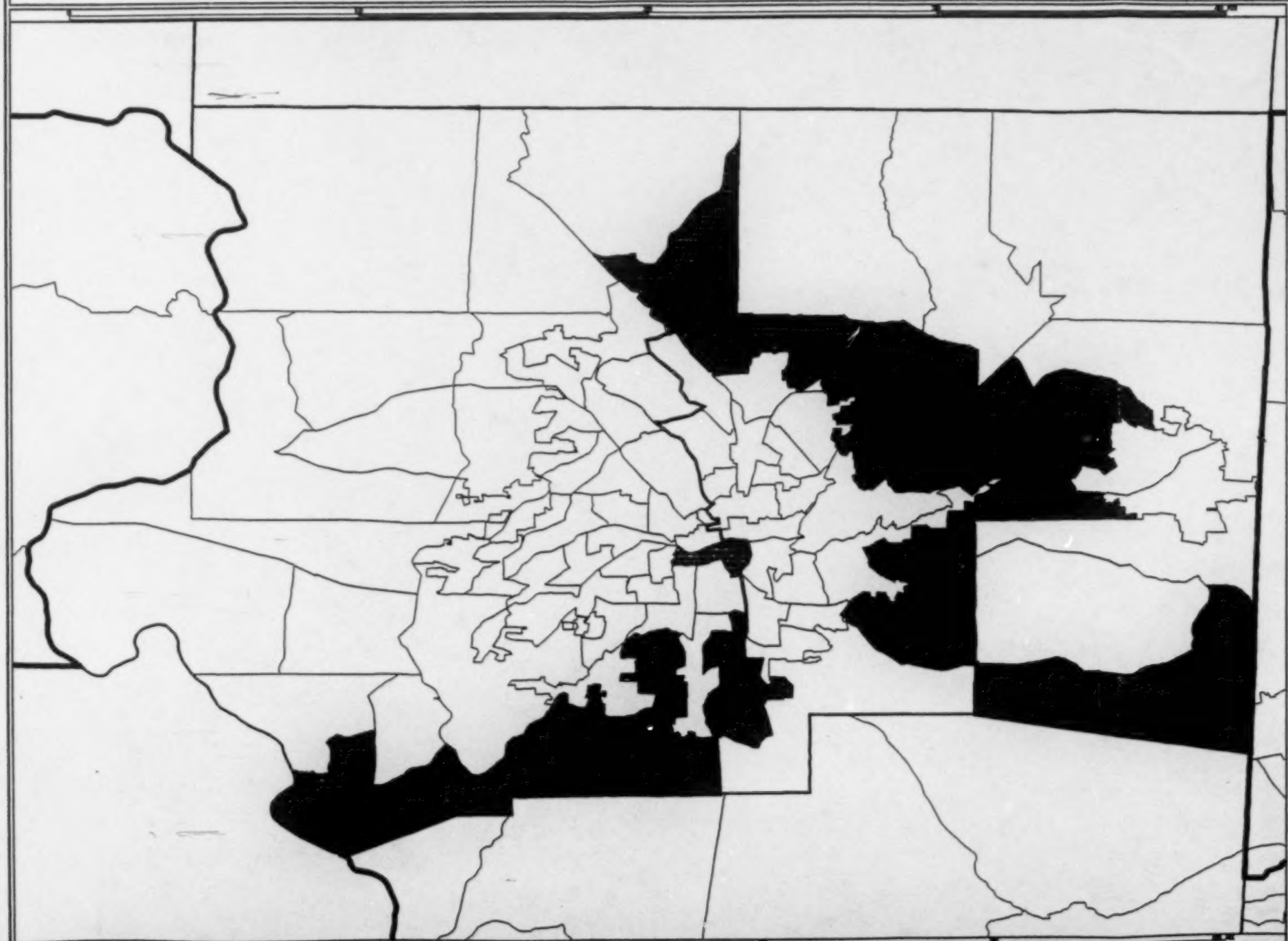
- 3 Republican Victories
- 2 Republican Victories
- 1 Republican Victory
- 0 Republican Victories

8a

December 22, 1998

N.C. General Assembly
Legislative Services Ofc.
Redistricting System
Software Copyright 1990
Public Systems Associates

Republican Victories in Forsyth County Precincts Abutting District 12



LEGEND

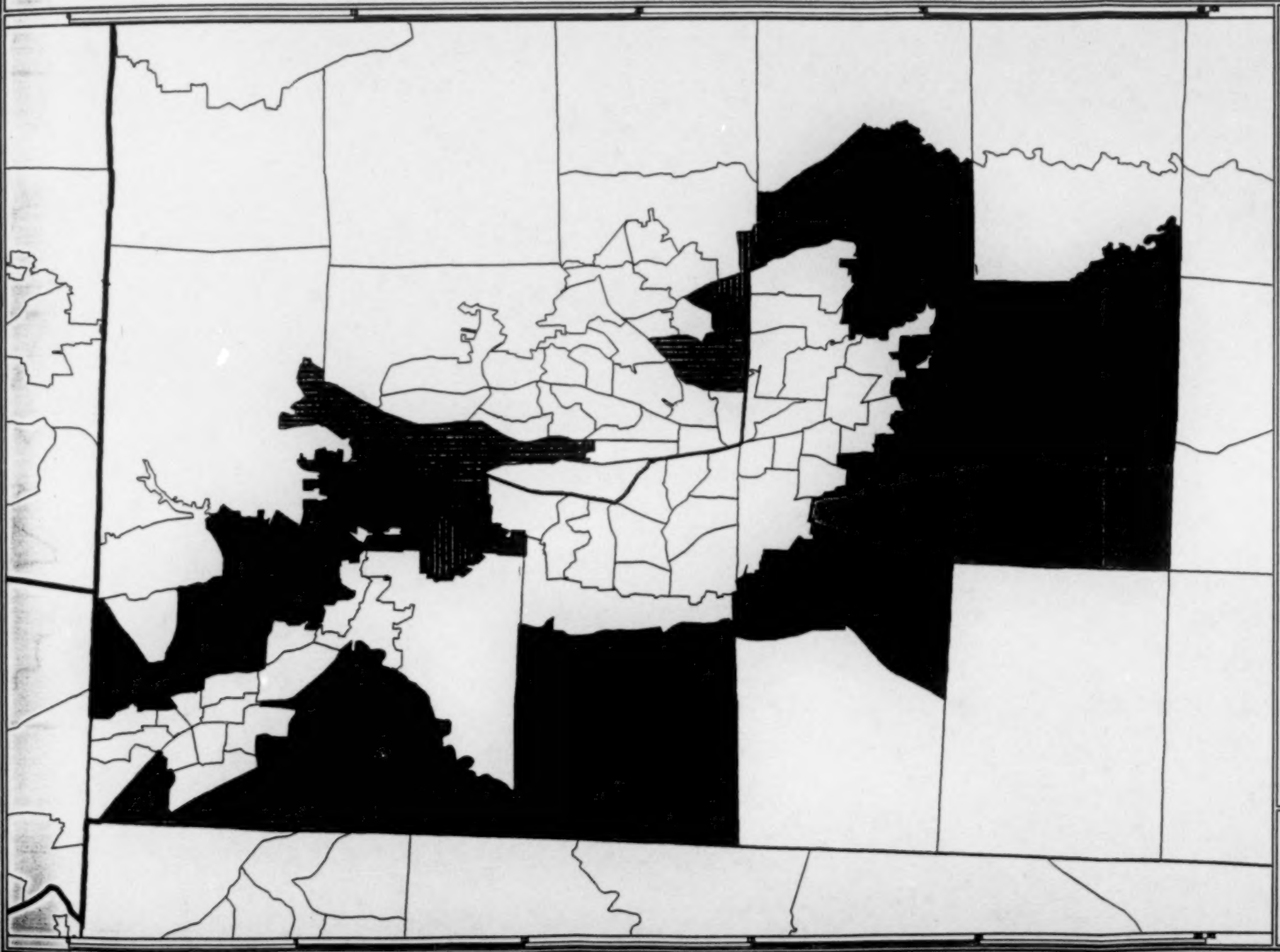
- County Boundary
- VTD boundary
- Dist. Boundary (H93)
- Dist. Boundary (C004)
- 3 Republican Victories
- 2 Republican Victories
- 0 Republican Victories

9a

December 22, 1998

N.C. General Assembly
Legislative Services Ofc.
Redistricting System
Software Copyright 1990
Public Systems Associates

Republican Victories in Guilford County Precincts Abutting District 12



LEGEND

- County Boundary
- VTD boundary
- Dist. Boundary (H93)
- Dist. Boundary (C004)

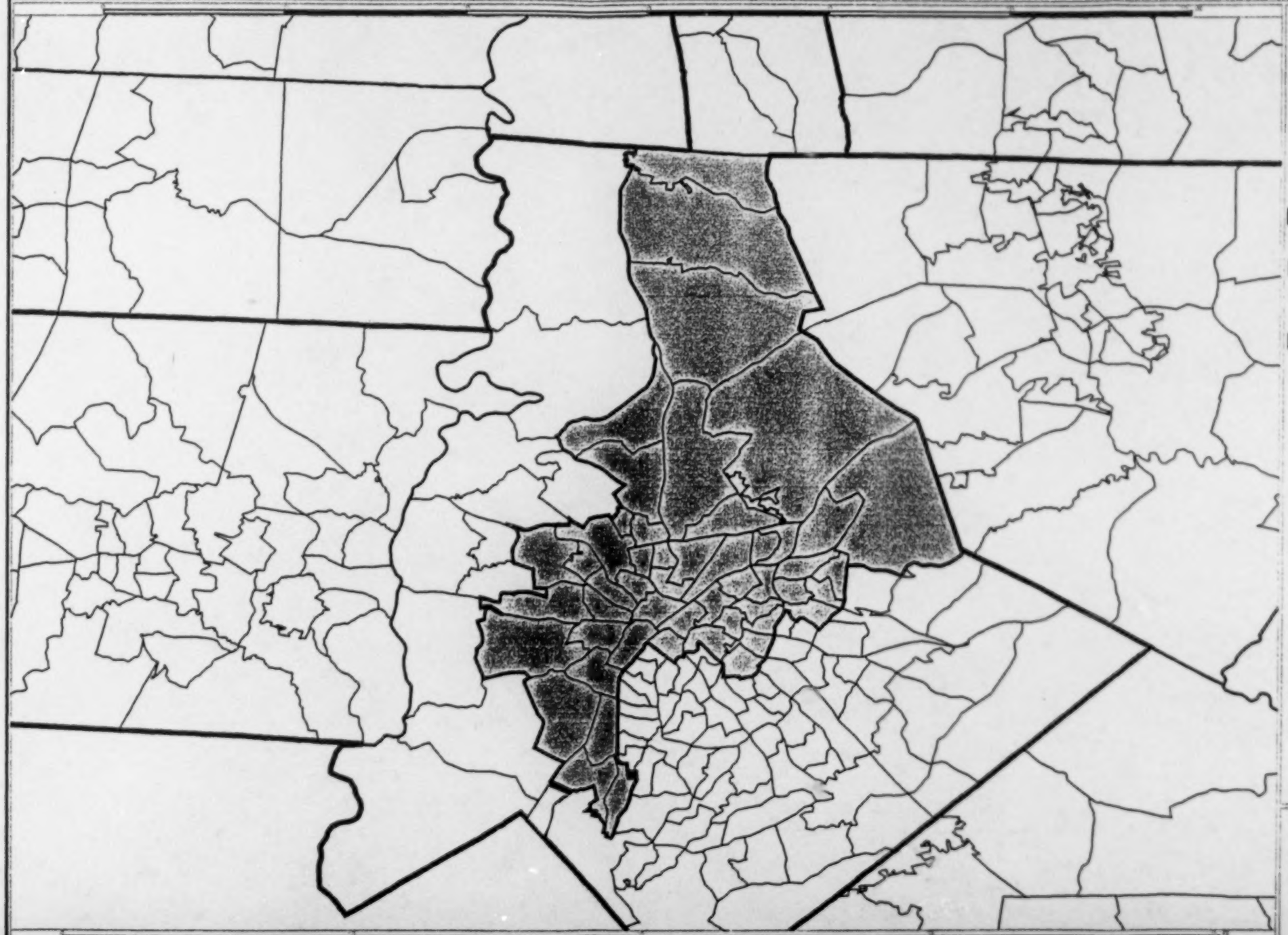
- 3 Republican Victories
- 2 Republican Victories
- 1 Republican Victory
- 0 Republican Victories

10a

December 22, 1998

N.C. General Assembly
Legislative Services Ofc.
Redistricting System
Software Copyright 1990
Public Systems Associates

Mecklenburg County District 12 Precincts



LEGEND

- **County Boundary**
- **[illegible] Boundary**
- Dist. Boundary (H04)
- **Dist. Boundary (C004)**
- District 12
- Precincts Cited By Cromartie As "Excluded" From District 12
- District 12 Precincts With Lower Democratic Registration Than One Or More Adjacent Non-District 12 Precincts (None In This County)

11a

December 22, 1998

N.C. General Assembly
Legislative Services Ofc.
Redistricting System
Software Copyright 1990
Public Systems Associates

Forsyth County District 12 Precincts



LEGEND

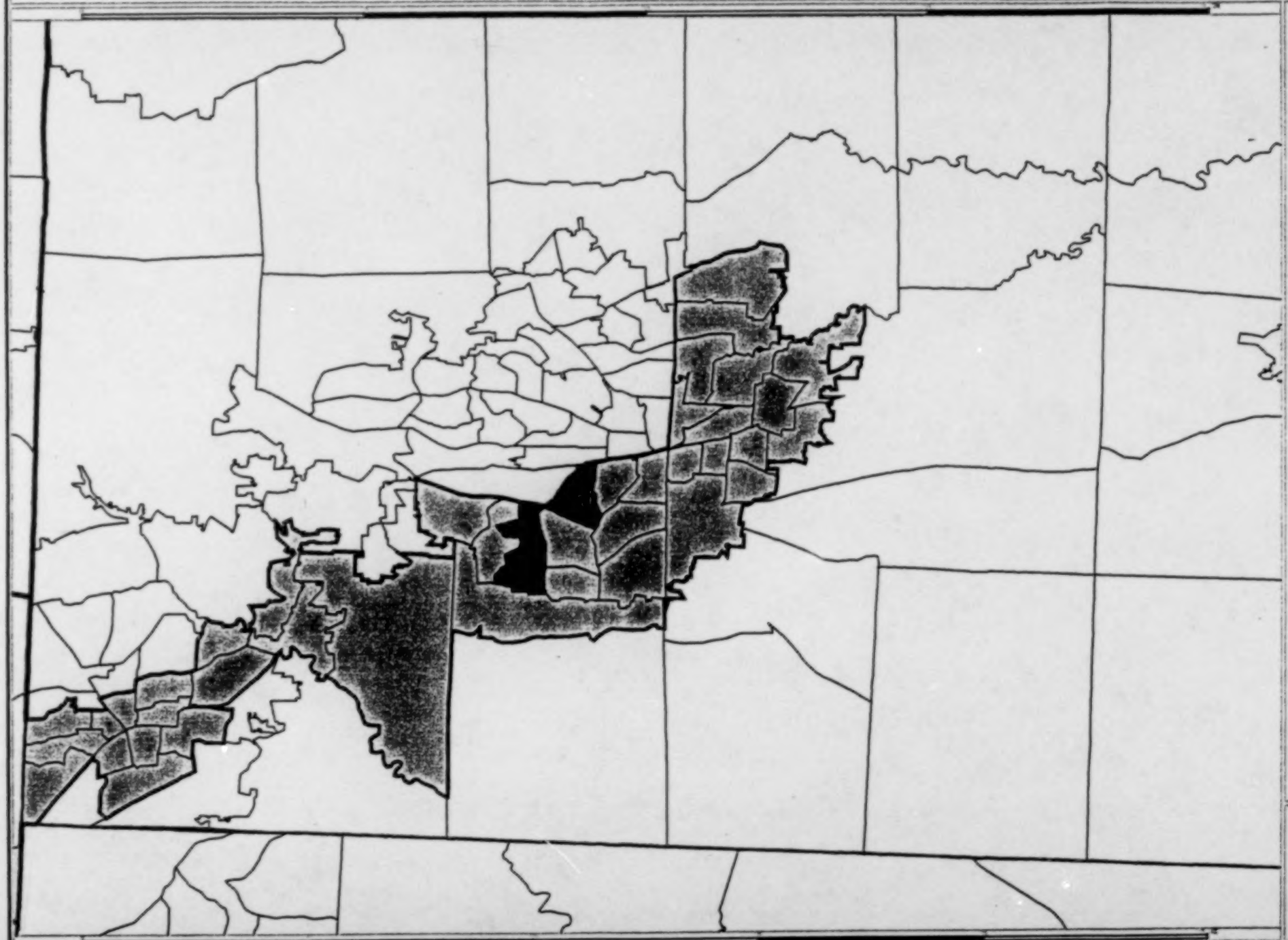
- **County Boundary**
- **[illegible] Boundary**
- Dist. Boundary (H93)
- **Dist. Boundary (C004)**
- District 12
- Precincts Cited By Cromartie As "Excluded" From District 12
- District 12 Precincts With Lower Democratic Registration Than One Or More Adjacent Non-District 12 Precincts

12a

December 22, 1998

N.C. General Assembly
Legislative Services Ofc.
Redistricting System
Software Copyright 1990
Public Systems Associates

Guilford County District 12 Precincts



LEGEND

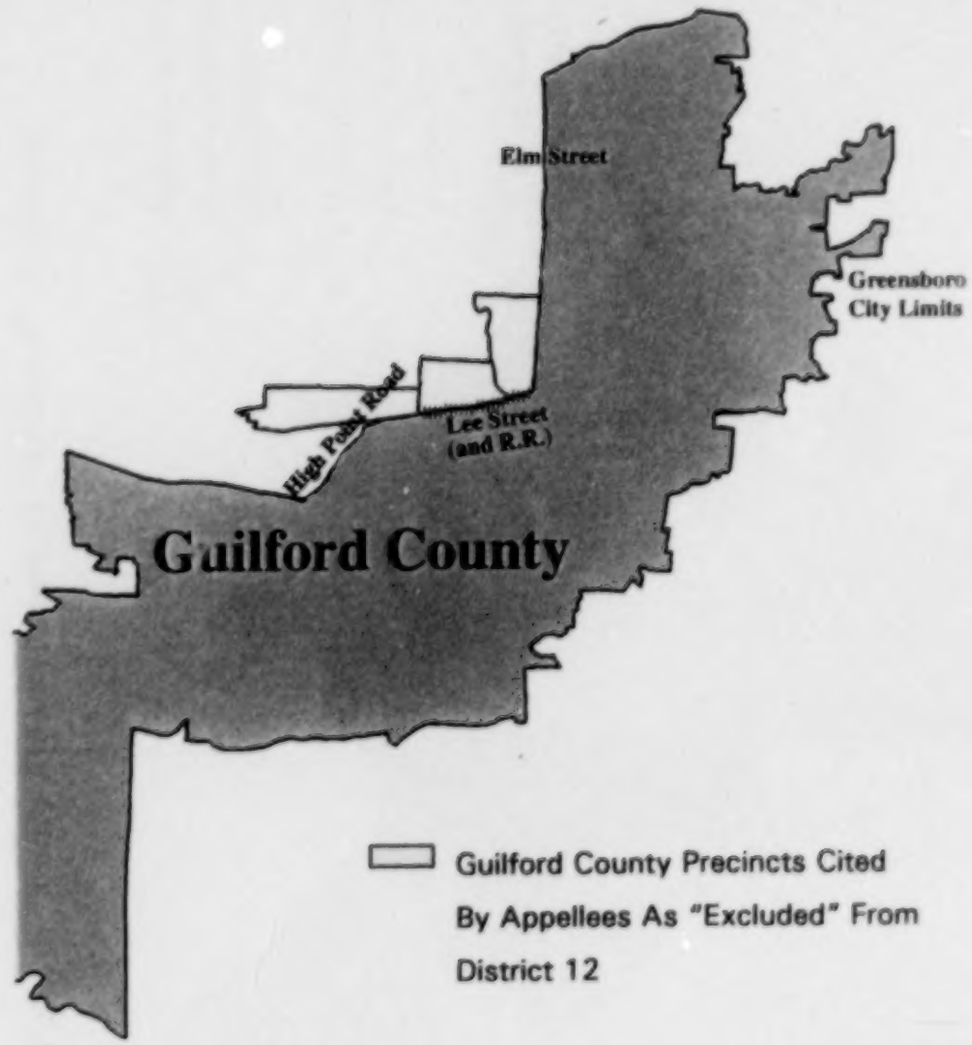
- **County Boundary**
- **VTD boundary**
- Dist. Boundary (H93)
- **Dist. Boundary (C004)**
- District 12
- Precincts Cited By Cromartie As "Excluded" From District 12
- District 12 Precincts With Lower Democratic Registration Than One Or More Adjacent Non-District 12 Precincts

13a

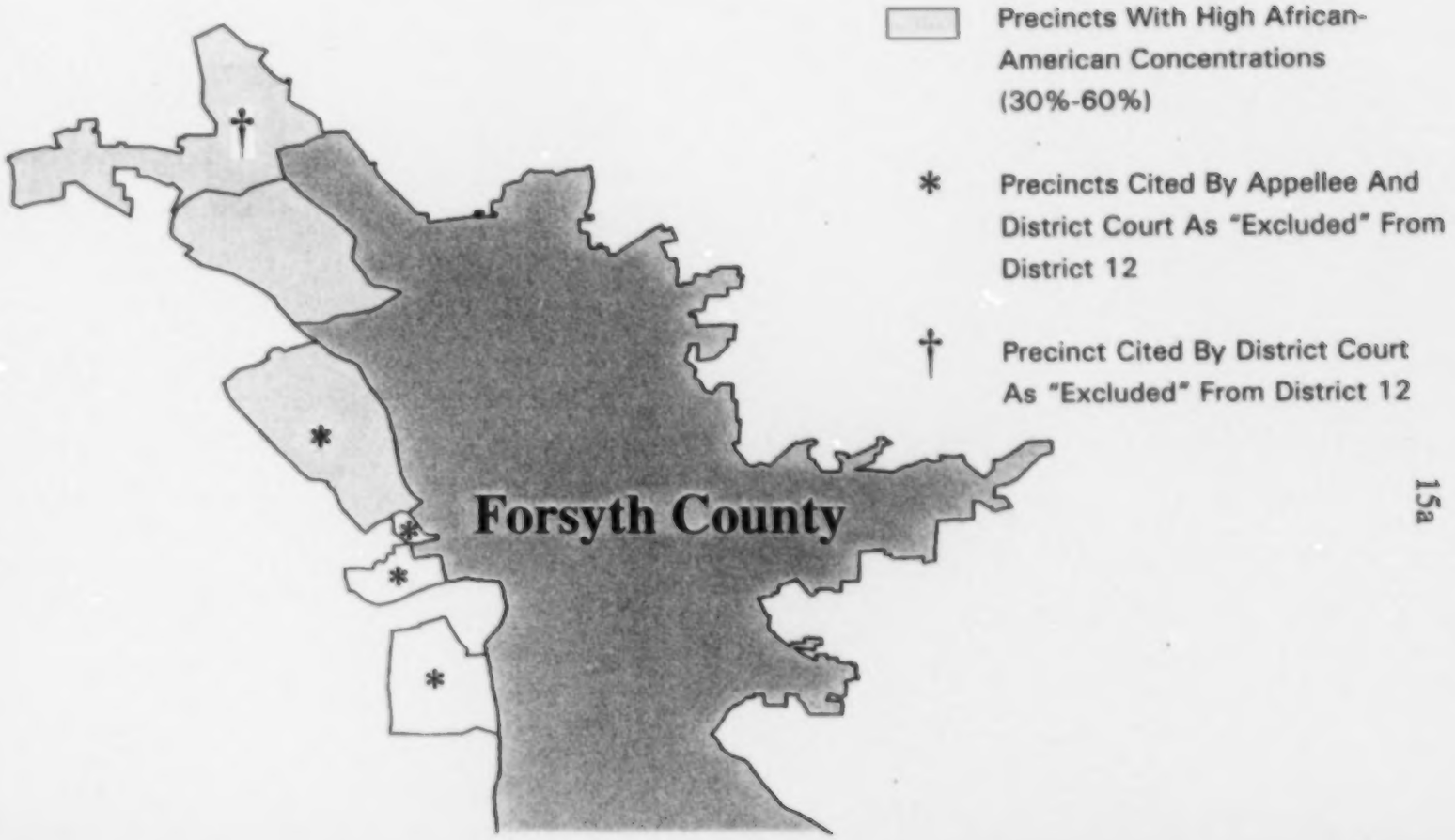
December 22, 1998

N.C. General Assembly
Legislative Services Ofc.
Redistricting System
Software Copyright 1990
Public Systems Associates

Guilford County Precincts "Excluded" By Elm and Lee Streets



Forsyth County African-American "Excluded" Precincts



No. 98-85

Supreme Court, U.S.
FILED
DEC 28 1998
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1998

JAMES B. HUNT, JR., *et al.*,

Appellants,

and

ALFRED SMALLWOOD, *et al*,

Appellant-Intervenors,

v.

MARTIN CROMARTIE, *et al.*,

Appellees.

On Appeal from the United States District Court
Eastern District of North Carolina

REPLY BRIEF OF APPELLANT-INTERVENORS

ELAINE R. JONES
Director-Counsel
THEODORE M. SHAW
NORMAN J. CHACHKIN
JACQUELINE A. BERRIEN
VICTOR A. BOLDEN
DEBORAH N. ARCHER
NAACP LEGAL DEFENSE
& EDUCATIONAL FUND, INC.
99 Hudson Street, Suite 1600
New York, New York 10013
(212) 219-1900

ADAM STEIN
FERGUSON, STEIN, WALLAS,
ADKINS GRESHAM &
SUMTER, P.A.
312 West Franklin Street
Chapel Hill, NC 27516
(919) 933-5300

TODD A. COX*
NAACP LEGAL DEFENSE
& EDUCATIONAL FUND, INC.
1444 Eye Street, NW
10th Floor
Washington, DC 20005
(202) 682-1300

**Counsel of Record*

Attorneys for Appellant-Intervenors

TABLE OF CONTENTS

Page

Table of Authorities ii

Argument 1

I. Appellees Have Not Justified the Grant of Summary Judgment Below 1

A. Appellees fail to identify record evidence and facts supporting the lower court's grant of summary judgment 1

B. This Court should reject Appellees' request that it change its holdings in order to sustain the judgment below 3

II. On the Record Before It, the Court Below should have Determined Whether the 1997 Plan could be Justified under Strict Scrutiny 12

Conclusion 15

TABLE OF AUTHORITIES

CASES

Page

Abrams v. Johnson,
521 U.S. 74 (1997) 10

Burns v. Richardson,
384 U.S. 73 (1966) 7

Bush v. Vera,
517 U.S. 952 (1996) 4, 10

Freeman v. Pitts,
503 U.S. 467 (1992) 11

Keyes v. School District No. 1, Denver,
413 U.S. 189 (1973) 10

Lawyer v. Department of Justice,
521 U.S. 567 (1997) 5, 12

Lewis v. Casey,
518 U.S. 343 (1995) 8

Miller v. Johnson,
515 U.S. 900 (1995) ..... *passim*

Milliken v. Bradley,
433 U.S. 267 (1977) 8, 11

Missouri v. Jenkins,
515 U.S. 70 (1995) 11

Scott v. United States,
920 F. Supp. 1248 (M.D. Fla. 1996),
aff'd sub nom. Lawyer v. Department of Justice, 521 U.S. 567 (1997) 5, 12

CASES (continued)

Page

Shaw v. Hunt,
517 U.S. 899 (1996) ..... *passim*

Shaw v. Reno,
509 U.S. 630 (1993) 3, 12

Swann v. Charlotte-Mecklenburg Board of Education,
402 U.S. 1 (1971) 11

Thornburg v. Gingles,
478 U.S. 30 (1986) 10

United States v. Hays,
515 U.S. 737 (1995) 4

Upham v. Seamon,
456 U.S. 37 (1982) 8

Village of Arlington Heights v. Metropolitan Development Corp.,
429 U.S. 252 (1977) 3

Voinovich v. Quilter,
507 U.S. 146 (1993) 6, 7

White v. Weiser,
412 U.S. 783 (1973) 6

Wise v. Lipscomb,
437 U.S. 535 (1978) 7

Wygant v. Jackson Board of Education,
476 U.S.267 (1986) 12

REPLY BRIEF OF APPELLANT-INTERVENORS

ARGUMENT

I. Appellees Have Not Justified the Grant of Summary Judgment Below

A. Appellees fail to identify record evidence and facts supporting the lower court's grant of summary judgment

Appellees struggle mightily, but ultimately unsuccessfully, to articulate an adequate basis in the record for the lower court's grant of summary judgment in their favor. For instance, they assert that "the shape of the Twelfth District . . . especially when juxtaposed against the race-based Twelfth District of the 1992 plan . . . is strong evidence as to the racial motive for the plan," Appellees' Brief on the Merits ("Br.") at 9, and that the 1997 plan "fails the 'eyeball test,'" Br. at 25. The majority of the court below was not persuaded by these arguments, observing instead that a "comparison of the 1992 District 12 and the present District [12] is of limited value here." Appendix to the Jurisdictional Statement on Behalf of the State of North Carolina ("NC. J.S. App.") at 19a. It is one thing to defend a judgment by presenting an alternative legal theory based upon which the decision may be sustained; it is quite another to pin one's hopes upon an assessment of evidence whose significance was specifically discounted by the court below.

Appellees also baldly ascribe racial motivations to the North Carolina General Assembly for which record support is lacking. *See, e.g.*, Br. at 34-35, describing without any record citation what "legislators were assuming" and alleging, contrary

to the documentary evidence presented by the State in the lower court, that "the General Assembly relied on 'racial stereotypes' and treated a 'significant number' of black voters as 'mere racial statistics.'"[1]

On the other hand, Appellees' attempt to bolster the significance of the few "facts" actually discussed by the court below is highly selective, if not misleading. For example, focusing on the nine "excluded" precincts with majority-Democratic registration cited by the district court, Appellees note that Democratic candidates won 24 of 27 statewide electoral contests in these precincts, sometimes by proportions exceeding their share of registration. Br. at 35-36. However, Appellees provide no data comparing these precincts' partisan registration figures or performance at the polls with those of adjacent precincts that were placed within District 12 – because those data are consistent with the General Assembly's explanation of the districting plan rather than with Appellees' accusations. *See, e.g.*, Brief for United States as *Amicus Curiae* at 25 n.9.

---

[1]Appellees' criticisms of the evidence introduced below by the State of North Carolina are similarly ineffectual. For example, they complain that data on political performance examined by the State's expert witness, Dr. Peterson, do not support the conclusion he drew (that partisan voting strength, rather than race, accounted for the placement of precincts within District 12) because of the high proportion of North Carolina's African-American citizens who register as Democrats and vote for Democratic candidates. Br. at 33-34. However, Appellees offer no persuasive evidence to support *their* inference from those data: that race, rather than politics, was the predominant factor in shaping the districting plan. Thus, Appellees' criticism serves only to underscore the inappropriateness of deciding complex questions of legislative motivation on summary judgment.

B. This Court should reject Appellees' request that it change its holdings in order to sustain the judgment below

Perhaps in recognition of these difficulties, Appellees ask this Court to change the legal standard enunciated in *Shaw v. Reno*, 509 U.S. 630 (1993) and applied in subsequent cases – and to adopt now a rule that the Court explicitly declined to announce in *Miller v. Johnson*, 515 U.S. 900 (1995),[2] one that would hold unconstitutional any districting plan in the creation of which race was *a* factor, although not the *predominant* factor. Br. at 19, 20. Citing *Village of Arlington Heights v. Metropolitan Dev. Corp.*, 429 U.S. 252 (1977), Appellees contend that this Court should thus modify the standard announced in *Shaw*, and that review of a remedial plan drawn to cure a prior *Shaw* violation requires a particularly "demanding judicial scrutiny."[3] However, Appellees' arguments are inconsistent with the concern for State interests that underlies the standard of review developed in this Court's *Shaw*

---

[2]*See, e.g.*, 515 U.S. at 916 (legislatures "almost always . . . aware of racial demographics but it does not follow that race predominates"); *id.* (other districting principles must be *subordinated* to race) (opinion of the Court); *id.* at 928 (O'Connor, J., concurring); *id.* at 935 (Ginsburg, J., dissenting).

[3]Drawing analogies to school desegregation and criminal due process cases in which evidence was held inadmissible if it is the "fruit" of an unconstitutional search or arrest, Br. at 20, 21, Appellees argue that district courts must assure that remedial plans contain no "'vestiges' of the unconstitutional racial gerrymander" and that "all 'traces' of the earlier predominant racial motive have been rooted out." *Id.* at 22. Appellees assert that they are "entitled to a presumption that 'current disparities are causally related'" to the prior plan and that the burden of rebutting this presumption rests with the defendants. *Id.*

jurisprudence and also conflict with the Court's long-standing precedents in the apportionment context. Moreover, their contentions serve only to highlight the lower court's error in disregarding this Court's precedents when it evaluated the 1997 Remedial Plan.

First, as discussed in Appellant-Intervenors' opening brief, in cases such as this one, this Court requires that the plaintiffs (Appellees here) show that "'race for its own sake, and not other districting principles, was the legislature's dominant and controlling rationale in drawing its district lines,'" *Bush v. Vera*, 517 U.S. 952, 958 (1996), *quoting Miller v. Johnson*, 515 U.S. at 913, and "that other, legitimate districting principles were 'subordinated' to race." *Bush*, 517 U.S. at 959. Thus, it is insufficient for Appellees to show merely that inclusion of African-American voters was one factor influencing the contours of a district in the plan adopted by the legislature – or even that the entire districting process was carried out "with consciousness of race," *Bush*, 517 U.S. at 958. *See also id.* at 993 ("States may intentionally create majority-minority districts and may otherwise take race into consideration, without coming under strict scrutiny. Only if traditional districting criteria are neglected, *and* that neglect is predominantly due to the misuse of race, does strict scrutiny apply") (O'Connor, J., concurring) (emphasis in original); *United States v. Hays*, 515 U.S. 737, 745 (1995) ("We recognized in *Shaw* . . . that the 'legislature always is *aware* of race when it draws district lines, just as it is aware of age, economic status, religious and political persuasion, and a variety of other demographic factors. That sort of race

consciousness does not lead inevitably to impermissible race discrimination'") (citation omitted) (emphasis in original); Brief of Appellant-Intervenors at 32-37.[4]

This Court's recognition that legislatures are always aware of race in drawing district lines, and its consequent holding that legislatures may permissibly take race into consideration in that process so long as racial considerations do not predominate, carves out a limited role for federal courts in the redistricting process of States that is effective without being overly intrusive. *See Miller v. Johnson*, 515 U.S. at 915-17. The Court has declined to alter that role when a legislative plan adopted to remedy an earlier constitutionally infirm apportionment is at issue. *See Lawyer v. Department of Justice*, 521 U.S. 567 (1997), *aff'g Scott v. United States*, 920 F. Supp. 1248 (M.D. Fla. 1996). While making unsupported accusations that the North Carolina General Assembly deliberately set out to evade the requirements of this Court's ruling in *Shaw v. Hunt*, 517 U.S. 899 (1996), Appellees have presented no

---

[4]Appellees suggest that the legislators "took the position that Shaw applied only to majority-minority districts" and "attempted to comply with *Shaw* even though they created an obviously race-based district. . . ." Br. at 16. The comments of Senator Cooper and Representative McMahan on which Appellees rely, Br. at 14-15, are descriptive of the results of drawing a plan based on partisan political considerations, not of the procedures by which the districts were created. However, the fact that District 12 is not majority-black is relevant to a federal court's determination whether race was a predominant factor in its creation. As this Court stated in *Lawyer v. Department of Justice*, 521 U.S. 567, ___, 117 S. Ct. 2186, 2195 (1997), *aff'g Scott v. United States*, 920 F. Supp. 1248 (M.D. Fla. 1996), "[t]he fact that District 21 under Plan 386 is not a majority black district . . . supports the District Court's finding that the district is not a 'safe' one for black-preferred candidates, but one that 'offers to any candidate, without regard to race, the opportunity' to seek and be elected to office" (citation omitted).

convincing reason why this Court should adopt the standard they describe as the "*Arlington Heights* test," which would bar *any* consideration of race by a legislature enacting a remedial plan and make the scope of federal courts' inquiries into districting processes vastly more intrusive.

Second, Appellees' "fruit of the poisonous tree" argument is also not persuasive, since States are not required to discard completely the original challenged plan before developing a new remedial redistricting plan. As pointed out in our opening brief, Appellees' argument finds no support in *Shaw*, its progeny, or in other cases which define how remedies must be fashioned in voting cases. This Court has consistently accorded great deference to the States' policy choices in the redistricting process and has repeatedly held that the redistricting policy choices of the State should be set aside by a federal court only to the extent necessary to remedy a violation of federal law. *See, e.g., White v. Weiser*, 412 U.S. 783, 795 (1973) (in devising a remedy for a federal constitutional violation, a court "should follow the policies and preferences of the State, expressed in statutory and constitutional provisions or in reapportionment plans proposed by the state legislature, whenever adherence to state policy does not detract from the requirements of the Federal Constitutions"); *see also Voinovich v. Quilter*, 507 U.S. 146, 156 (1993) ("[F]ederal courts are bound to respect the States' apportionment choices unless those choices contravene federal requirements"). It is not enough for litigants or the federal courts to simply prefer a different redistricting outcome; rather, the State's preferences may be disregarded only to the extent necessary to remedy the violation. Where, as in this case, the State has enacted a new plan that fully remedies the *Shaw* violation and complies with all

applicable federal and state constitutional and statutory provisions, there is no basis for federal judicial interference with its implementation. *Wise v. Lipscomb*, 437 U.S. 535, 540 (1978); *see also Shaw v. Hunt*, 517 U.S. at 917 n.9 ("states retain broad discretion in drawing districts to comply with the mandate of § 2") (citing *Voinovich v. Quilter* and *Growe v. Emison*, 507 U.S. 25 (1993)); *Burns v. Richardson*, 384 U.S. 73, 85 (1966) ("A State's freedom of choice to devise substitutes for an apportionment plan found unconstitutional, either as a whole or in part, should not be restricted beyond the clear commands of the Equal Protection Clause"). *See also* Brief of Appellant-Intervenors at 28-31.

Finally, Appellees' analogy to school desegregation jurisprudence is equally unavailing. Unlike the finding of system-wide *de jure* discrimination in the typical school desegregation case, findings of statutory or constitutional violations in apportionment plans often involve only a limited number of districts rather than the entire plan. There is thus no reason to anticipate that there are "vestiges" of racial predominance outside the specific electoral districts held to be invalid.[5] Moreover, Appellees themselves fail to indicate what

---

[5]In this case, in addressing the constitutional violation found to exist by the court below in the 1997 Remedial Plan, the General Assembly made changes to the boundaries of only the Twelfth District and five adjacent districts. Although these changes were accepted as a sufficient remedy by the lower court, the court had granted Appellees preliminary injunctive relief enjoining the conduct of *all* of the State's 1998 congressional primaries – including those held in districts unaffected by the violation in the Twelfth District – and dispensing with the State's normal runoff procedures. *See* Defendants' Memorandum in Support of Motion to Reconsider Stay and to Shorten Time for Response, filed April 17, 1998. This injunctive relief was unnecessarily broad because, even having found a discrete constitutional violation, the district court was bound by this

such "vestiges" might be, other than what they characterize as "a clear resemblance . . . between the earlier unconstitutional plan and the remedial plan." Br. at 22.[6] *But see* NC. J.S. App.

Court's precedents to tailor the nature and scope of the remedy to match the nature and scope of the violation. *See, e.g., Lewis v. Casey*, 518 U.S. 343, 357 (1995) ("The remedy must of course be limited to the inadequacy that produced the injury-in-fact that the plaintiff has established") (citation omitted); *Upham v. Seamon*, 456 U.S. 37, 43 (1982) (court's remedy must be limited to curing constitutional and or statutory defect); *Milliken v. Bradley*, 433 U.S. 267, 281-82 (1977) ("federal court decrees exceed appropriate limits if they are aimed at eliminating a condition that does not violate the Constitution or does not flow from such a violation . . ."). A systemwide remedy is inappropriate absent a finding of a systemwide violation.

The harm to the State's interests, and to political participation in North Carolina, that resulted from the order disrupting the election process by delaying and otherwise altering election schedules is significant and has been frequently recognized by this Court. Altering the State's regular election calendar, conducting congressional elections without statewide races on the ballot, and conducting elections in close proximity to each other all contribute to low voter turnout. *See* Expert Witness Declaration of Bernard N. Grofman, Ph.D. in *Shaw v. Hunt*, July 24, 1996, at 6 (lodged with the Clerk of this Court at the time of filing of the Memorandum of *Amici Curiae* Alfred Smallwood, *et al.*, in Support of Emergency Application for Stay Pending Appeal). This result is exacerbated for minority groups, such as African Americans, because they tend to be poorer and less well educated than their white counterparts, and, consequently, tend to have lower levels of political participation. *See id.* at 9.

[6]Appellees do intimate, elsewhere in their brief, that any Congressional district that would re-elect the present incumbent of District 12 is necessarily so connected to the unconstitutional features of the 1992 plan as to be *per se* impermissible. They assert that the Congressman reelected from that district holds racially "polarizing view[s]" about which he testified in the 1994 *Shaw v. Hunt* trial, Br. at 12 n.19 and accompanying text, and they imply that only the election of a different Representative could fully cure the prior constitutional violation, Br. at 46-47. These arguments misrepresent Rep. Watt's views and his record, and they demean the

---

thousands of *white and African-American* constituents, such as Appellant-Intervenors, who have returned him to office.

In the first place, the excerpt from Rep. Watt's trial testimony in Appellees' Br. at note 19 (quoting from the dissenting opinion in the trial court's ruling in *Shaw v. Hunt*), conflates a portion of one *question* with a portion of Rep. Watt's *answer*, torn from its appropriate context. Only Appellees' counsel referred to the "white community" – in his compound question. Rep. Watt's answer was not given in racial terms at all but focused on "compromising and walking the line between the business community and the community." The entire exchange is set out in the Appendix, *infra*, at pp. 1a-3a.

Moreover, as Appellees themselves recognize, Br. at 8 n.15, Rep. Watt (like other African-American Representatives in Congress who were originally elected from majority-black districts created following the 1990 Census) has now been re-elected from a majority-white district. The creation of these districts provided these Representatives with a crucial advantage of incumbency: the opportunity to overcome white voters' stereotypical expectations, as Rep. Watt did, by providing meaningful representation and effective constituent service to *all* of their districts' residents. These Members of Congress were thus enabled to overcome long-maintained patterns of white racial bloc voting and to win office in redrawn, now majority-white districts.

While this development is of course a welcome one, its significance should not be overstated. It does not in any way undercut the original necessity of creating these districts, which provided minority voters with their initial opportunity, equal to that of white voters, to elect candidates of their choice to Congress. As in other southern states, for example, prior to the 1992 redistricting that resulted in the creation of District 12, no African-American candidate had ever been elected to Congress from North Carolina in this century, even when candidates enjoyed the overwhelming support of African-American voters. Nor does it foreclose the possibility that such remedies may still be required to avoid minority vote dilution; whether candidates of choice of minority voters who do not have the advantages of incumbency described above will have a realistic opportunity to win election in majority-white districts, even in North Carolina, is presently unknown and can be determined only based upon a "searching practical evaluation of the past and present reality" of the political process in a specific jurisdiction,

at 19a (majority of court below states that "comparison of the 1992 District 12 and the present District is of limited value here").[7]

The school desegregation cases in fact support the current legal standard. In the school desegregation context, this Court has "articulated a three-part framework . . . to guide

---

Thornburg v. Gingles, 478 U.S. 30, 45 (1986) (internal citation add quotation omitted). To the extent, therefore, that Appellees' mention of this extra-record development is intended to suggest that compliance with Section 2 should no longer be considered a compelling governmental interest, it is in direct conflict with this Court's precedents. *See, e.g., Shaw*, 517 U.S. at 914 (assuming without argument that "§ 2 could be a compelling interest"); *Miller*, 515 U.S. at 915 (race-consciousness in drawing district lines would not alone render a districting plan presumptively unconstitutional); *Bush*, 517 U.S. at 990, 992 (O'Connor, J., concurring).

[7]Appellees similarly argue that they are entitled to the benefit of the "presumption that 'current disparities are causally related' to" the prior constitutional violation, Br. at 22; *see Keyes v. School Dist. No. 1, Denver*, 413 U.S. 189, 201, 208, 213 (1973). But they never identify what "disparities" would give rise to the presumption, other than by referring to the creation of a district with a higher proportion of African-American voters than the State as a whole, *see* Br. at 46. This Court has expressly rejected such a redistricting standard. *See Lawyer*, 521 U.S. at __ ,117 S. Ct. at 2195 ("we . . . have never recognized similar racial composition of different political districts as being necessary to avoid an inference of racial gerrymandering in any one of them. Since districting can be difficult, after all, just because racial composition varies from place to place, and counties and voting districts do not depend on common principles of size and location, facts about the one do not as such necessarily entail conclusions about the other"). Moreover, the rule proposed by Appellees would be fundamentally contrary to this Court's decisions, which hold that States may recognize communities of minority voters so long as race does not predominate in fashioning a districting plan and, even if it does, so long as the plan is narrowly tailored to achieve a compelling state interest. *See Miller*, 515 U.S. at 920; *Bush*, 517 U.S. at 958-959, 976; *Abrams v. Johnson*, ___ U.S. ___, 117 S. Ct. 1925, 1933, 1936 (1997).

district courts in the exercise of their remedial authority." *Missouri v. Jenkins*, 515 U.S. 70, 88 (1995). As this Court stated in *Milliken v. Bradley*, 433 U.S. 267 (1977),

> In the first place, like other equitable remedies, the nature of the desegregation remedy is to be determined by the nature and scope of the constitutional violation. . . . The remedy must therefore be related to 'the *condition* alleged to offend the Constitution. . . .' Second, the decree must indeed be *remedial* in nature, that is, it must be designed as nearly as possible 'to restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct.' Third, the federal courts in devising a remedy must take into account the interests of state and local authorities in managing their own affairs, consistent with the Constitution.

Id. at 280-81 (footnotes and citations omitted). In *Freeman v. Pitts*, 503 U.S. 467 (1992), this Court concluded that this inquiry should focus upon "'whether the [constitutional violator] ha[s] *complied in good faith* with the desegregation decree since it was entered, and whether the vestiges of past discrimination ha[ve] been eliminated *to the extent practicable*.'" *Id.* at 492 (quoting *Board of Education v. Dowell*, 498 U.S. 237, 249-50 (1991) (emphasis added). Indeed, "[t]he task is to correct, *by a balancing of the individual and collective interests*, the condition that offends the Constitution." *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. at 15-16 (emphasis added). Far from calling present law into question, this Court's standard for analyzing school desegregation plans establishes a role for federal courts in such cases that is entirely consistent with a

federal court's duty in evaluating remedial redistricting plans. *See* Motion to Affirm or, in the Alternative, to Dismiss, of Appellee-Intervenors in *Hunt v. Cromartie*, No. 98-45 at 17-20.

In the end, Appellees' recitation is bereft of specific evidence from the record that could support the grant of summary judgment and that judgment could be sustained, if at all, only if the Court embraced Appellees' plea that it abandon long-standing precedents.[8]

II. On the Record Before It, the Court Below should have Determined Whether the 1997 Plan could be Justified under Strict Scrutiny

While Appellant-Intervenors continue to believe, as we have argued, that the court below erred in entering summary judgment in favor of Appellees based on its unsupportable conclusion that race predominated in the 1997 districting process, even if this Court were not to question that conclusion,

---

[8]As part of their request that this Court alter its precedents, Appellees contend that defendants in this case bear the burden of proving that there is no causal relationship between the constitutional infirmities found by the Court in the 1992 Plan and the 1997 Remedial Plan. This, of course, is contrary to the well-settled law that in challenges to the constitutionality of a districting plan under the Fourteenth Amendment jurisprudence established by this Court in *Shaw v. Reno* and *Miller v. Johnson*, "[t]he plaintiff bears the burden of proving the race-based motive. . . ." *Shaw*, 517 U.S. at 905 (citation omitted). *See also Miller*, 515 U.S. at 916. This burden does not shift during the remedial phase of such a challenge. *See Scott v. United States*, 920 F. Supp. 1248 (M.D. Fla. 1996), *aff'd sub nom. Lawyer v. Department of Justice*, 521 U.S. 567 (1997). The rule is an application of the equally well-settled principle that in constitutional challenges, *plaintiffs* bear the burden of proof throughout the case. *See Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 277 (1986) (opinion of Powell, J., for the plurality); *id.* at 292-93 (O'Connor, J., concurring).

the judgment of the district court cannot stand. Having found that the legislature took race into account in a predominant fashion in drawing the plan, as we argued in our opening Brief at 40-41, the lower court should have considered whether a legally sufficient basis existed to justify that action and whether it was sufficiently narrowly tailored to accomplish that interest.

The record contains ample evidence to create triable issues on these questions.[9] The affidavits of Senator Cooper and Representative McMahan each stated clearly that "racial fairness" was considered by the General Assembly, as was the "[o]bligation[] to represent all of our constituents of all races and to comply with the Voting Rights Act," *see* NC. J.S. App. at 77a, 83a; *see also id.* at 120 (statement of Representative McMahan on floor of North Carolina House). The summary judgment record also indicates that, in creating the plan, the legislature was aware of North Carolina's long history of official discrimination against African-Americans and their exclusion from the political process due to state and private

---

[9]Appellees assert that, once it had concluded that race predominated in the creation of the 1997 plan there was no need for the court below to have considered whether the plan could survive a strict scrutiny analysis, because the State's principal defense was that politics, not race, accounted for the configuration of the plan. While Appellees mischaracterize the State's argument as being "that no racial motive existed for the design of District 12," Br. at 43, in fact, the State and Appellant- Intervenors have consistently argued only that race was not the *predominant* motive for the plan. However, Appellees reject this Court's holdings that a districting plan is unconstitutional only if racial considerations *predominate* in its creation and the plan is not narrowly tailored to accomplish a compelling governmental objective. *See* Br. at 44 ("in claiming that the redistricting plan was primarily for protecting incumbents and maintaining partisan balance, appellants have made clear that *no* grounds exist for finding that District 12 could survive strict scrutiny"). *See supra* p. 3 n.2 and accompanying text.

action. Moreover, there was evidence from the Section 5 process that the State sought to "provid[e] minority voters a fair opportunity to elect representatives of their choice in at least two districts (Districts 1 and 12)," NC. J.S. App. at 64a, and that District 12 does afford African-American voters a fair chance to elect their candidate of choice. *See* NC. J.S. App. at 66a.

Thus, the State concealed neither its need to be racially fair when submitting a plan for review under Section 5 nor the fact that it has been on notice regarding its Section 2 obligations since *Gingles*. It is simply untrue that "nothing in this record even remotely suggests that the evidence before the [district] court raised any issue of fact or law as to strict scrutiny," Br. at 44, or that "[n]othing in the record suggests that the [Twelfth] district was created in response to a 'compelling governmental interest' or that it embodied 'narrow tailoring'." Br. at 10. *See* Brief of Appellant-Intervenors at 8-9, 25-26, 32-41.

Under these circumstances, even if the court below had been correct in finding that race predominated in the legislature's development of the 1997 plan, before that court determined to enjoin implementation of the General Assembly's plan, it should have pursued the strict scrutiny analysis to assure itself that federal court interference with State districting preferences was necessary. *See Miller v. Johnson*, 515 U.S. at 914-16. Its failure to do so, in the face of record evidence highly relevant to the strict scrutiny analysis, constituted an independent legal error warranting reversal.

CONCLUSION

For the foregoing reasons, as well as those contained in the Brief of Appellant-Intervenors, this Court should reverse the judgment of the district court and enter judgment for defendants. In the alternative, this Court should vacate the judgment of the district court and remand the case for trial.

Respectfully submitted,

ELAINE R. JONES
Director-Counsel
THEODORE M. SHAW
NORMAN J. CHACHKIN
JACQUELINE A. BERRIEN
VICTOR A. BOLDEN
DEBORAH N. ARCHER
NAACP LEGAL DEFENSE
& EDUCATIONAL FUND, INC.
99 Hudson Street, Suite 1600
New York, NY 10013
(212) 219-1900

ADAM STEIN
FERGUSON, STEIN, WALLAS,
ADKINS, GRESHAM &
SUMTER, P.A.
312 West Franklin Street
Chapel Hill, NC 27516
(919) 933-5300

TODD A. COX*
NAACP LEGAL DEFENSE
& EDUCATIONAL FUND, INC.
1444 Eye Street, NW
10th Floor
Washington, DC 20005
(202) 682-1300

**Counsel of Record*

Attorneys for Appellant-Intervenors

APPENDIX

APPENDIX

Excerpts from Trial Testimony

Shaw v. Hunt, No. 92-202-Civ-5-BR (E.D.N.C.)

April 4, 1994

pp. 998-1001

[MELVIN WATT, BEING FIRST DULY SWORN, TESTIFIED AS FOLLOWS]

[CROSS-EXAMINATION]

[BY MR. EVERETT:]

[998]

Q. Now, in that same vein, have you stated at panel, which was videotaped, that I'm not sure that a black person representing a majority white district would have [999] had the freedom of voting against NAFTA?

A. Yes, I've said that.

Q. Is that still your opinion?

A. Yes. I mean, it's basically consistent with what I was saying before. If you represent inconsistent constituencies, it is more difficult to represent those inconsistent communities of interest.

And I expect, had I been representing more of the corporate interests, which is what you would have gotten in historical pattern of the way Congressional districts are drawn, I would have either had to change my view on that or I would have been out of step with the majority of my constituents on that issue and that's the context in which I made that statement.

Q. Did you, in the same context, say that it adds to the debate to be able to bring up a perspective without catering or having to cater to the business or white community?

A. Yes, sir, I made that statement. I can give you many examples of it. Most recently, this week, when I met with a banker. He pointedly asked me the question if comes down to voting my interests as a banker or voting what you perceive to be the communities of interest in your district and those two things are at odds with each other, I want you to tell me you are going to vote with me.

[1000] I looked at him and said, sir, I can't tell you that. I will tell you that I will consider your opinion, I will listen to you, I will allow you to persuade me, and if I believe that you are right, I will vote with you, with your interests.

But my interest, representing the constituency that I represent, and I would tell you, Mr. Everett, I would never have been able to make that statement in the context of the old 9th Congressional District. And so again, that's an example of the difficulty.

Now, I want to hasten to tell you that that doesn't mean that I don't have to compromise. I probably end up compromising and walking the line between the business community and the community a lot more than most people do, and I try to do it with integrity, and I try to do it as I believe I should do it.

But I would be in a completely different situation, in my opinion, if I represented a district like the old 9th and that's really what I was saying to you or in response to the question on direct, as to why I would not have run.

I consider myself a very principled person, much less so a political person in the sense that I am always trying to figure out the way the political winds are blowing. And representing a district that you are consistent with [1001] in your philosophies, allows you to be consistent in voting your conscience without buckling under or catering, as you said my statement said, to other interests that may not predominate in my district.

Q. Basically you seek to represent a constituency that's consistent with your particular view, is that it?

A. No, sir. I hope you don't misunderstand what I'm saying. I think I tried to articulate it as best I can. It's a lot more comfortable for any politician to represent a constituency that his or her personal opinions and views are consistent with.

98-85 (10)

No. ~~97-895~~

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1997

JAMES B. HUNT, JR., *et al.*,

Appellants,

v.

MARTIN CROMARTIE, *et al.*,

Appellees.

MOTION OF ALFRED SMALLWOOD, DAVID MOORE, WILLIAM M. HODGES, ROBERT L. DAVIS, JR., JAN VALDER, BARNEY OFFERMAN, VIRGINIA NEWELL, CHARLES LAMBETH, AND GEORGE SIMKINS (CURRENTLY DEFENDANT-INTERVENORS IN THE COURT BELOW) TO INTERVENE AS APPELLANTS IN THIS COURT

Alfred Smallwood, David Moore, William M. Hodges, Robert L. Davis, Jr., Jan Valder, Barney Offerman, Virginia Newell, Charles Lambeth and George Simkins ("Applicants"), by their undersigned attorneys, respectfully move this Court for leave to intervene as appellants in the above-captioned action, so that they may protect their interests (which have been recognized by the court below in permitting their intervention as of right as defendant-intervenors below following entry of the order under review on this appeal) in sustaining the constitutionality of the Twelfth Congressional District. As grounds for this motion, Applicants state the following:

1. Applicants are white and black registered voters residing in either North Carolina's Twelfth Congressional District (as reconfigured in the legislature's 1997 plan) or its First Congressional District.

RECEIVED
HAND DELIVERED
OCT - 2 1998
OFFICE OF THE CLERK
SUPREME COURT, U.S.

2. On July 9, 1996, appellees filed their complaint in this case. Days later, on July 11, 1996, Applicants sought to intervene in this suit as defendants. On November 26, 1997, after the district court failed to rule, Applicants renewed their motion to intervene. Appellees did not respond to either motion.

3. As of the March 31, 1998 hearing on cross-motions for summary judgment and request for preliminary injunction, the district court had not ruled on the motions to intervene, then pending for over twenty months and four months respectively; instead the court issued its permanent injunction and granted summary judgment without ruling on the unopposed motions or holding a hearing on intervention. In fact, the district court rebuffed counsel for Applicants' attempt to bring the motion to intervene to the Court's attention and expressly denied counsel for Applicants an opportunity to speak at the March hearing.

4. On April 3, 1998, the United States District Court for the Eastern District of North Carolina issued an order granting summary judgment to plaintiffs, declaring North Carolina's Twelfth Congressional District unconstitutional, permanently enjoining elections under the 1997 congressional redistricting plan, and ordering the State of North Carolina ("State") to submit a schedule for the General Assembly to adopt a new redistricting plan and to hold elections under that plan.[1] The Court issued its judgment on April 6, 1998.[2] Following the district court ruling, Applicants filed an *amicus curiae* memorandum in this Court, bringing to the Court's attention additional reasons why a stay of the district court's April order was essential.

---

[1] *See Cromartie v. Hunt*, No. 4:96CV104-BO(3) (E.D.N.C. April 3, 1998) (order and permanent injunction), attached to Jurisdictional Statement at Appendix 45a.

[2] *See* Judgment of United States District Court for the Eastern District of North Carolina, April 6, 1998, attached to Jurisdictional Statement at Appendix 49a.

5. On May 26, 1998, with the two prior intervention motions still pending, Applicants filed a *third* motion to intervene as defendants in the case. On June 20, 1998, after the deadline for filing a timely notice of appeal of the district court's April 3rd order and April 6th judgment, the district court ruled that the Applicants were entitled to intervene as of right in this action.

6. This Court has permitted individuals to intervene in cases on appeal to the Supreme Court in order to protect their interests, regardless of whether they were parties or intervenors below, so long as their interests are truly at stake. In *United States v. Terminal Railroad Association*, 236 U.S. 194, 199 (1915), the Court permitted parties denied intervention below to intervene on appeal to this Court so that they could seek modification of a decree "in so far as it might operate prejudicially to their rights." *See also Eastern-Central Motor Carriers Association v. United States*, 321 U.S. 194, 198-99 n.5 (1944) (Court permits intervention to organization that did not appear before three-judge district court below); *Labor Board v. Acme Industrial Co.*, 384 U.S. 925 (1966), 385 U.S. 432 (1967) (Court grants union's motion to intervene in Supreme Court appeal).

7. The delay in granting Applicants' motions to intervene prevented Applicants from fully participating as parties in the district court and prevented them from being able to exercise their right to appeal. Indeed, the court's delay in ruling on the motions to intervene and the timing of the subsequent grant of the motions to intervene were de facto denials, seriously prejudicing their rights below. Moreover, by refusing to rule on Applicants' motions, the district court placed Applicants in the position of being unable to either appeal the court's decision on the merits or appeal a denial of any of their motions to intervene.

8. As defendant-intervenors below, Applicants have a continuing interest in the

disposition of this litigation and the appeal of this case in this Court. The lower court decision and the ultimate disposition of this appeal will vitally affect their interests. This is why numerous courts, following *Shaw v. Reno*, 509 U.S. 630 (1993), have granted intervention to voters similarly situated to Applicants to defend challenges to redistricting plans, including in cases which have later proceeded to this Court on appeal. *See, e.g., Vera v. Richards*, 861 F. Supp. 1304, 1310 (S.D. Texas 1994), *aff'd*, 577 U.S. 952 (1996); *Johnson v. Miller*, No. CV 194-008, Order dated March 30, 1994 (S.D. Ga.). Indeed, Applicants have had a continuous interest in this case. These Applicants sought and were allowed to intervene as of right as party defendants in *Shaw v. Hunt*, No. 92-202-CIV-5 (Order, September 7, 1993), the predecessor to this action. Applicants participated fully in every stage of that case in the trial court and in this Court, including oral argument and also the remedial proceedings which resulted in the approval of the State's 1997 remedial plan.

9. Even before Applicants were allowed to participate as parties in this case, they filed pleadings throughout the litigation, including the summary judgment and preliminary injunction phases of the litigation, and appeared at the hearing on these issues in March 1998.

10. As in *Shaw v. Hunt*, Applicants seek to intervene in this case to protect their interest in defending the constitutionality of District 12 and, if necessary, to assert their rights under the U.S. Constitution and the Voting Rights Act. As in *Shaw*, if granted intervention on appeal in this Court, Applicants are prepared to follow the briefing schedule already set by the Court and coordinate their appeal with the State to avoid duplication of arguments.

WHEREFORE, Applicants pray that their motion to intervene be granted.

Respectfully submitted,

ADAM STEIN
Ferguson, Stein, Wallas, Adkins
Gresham & Sumter, P.A.
312 West Franklin Street
Chapel Hill, North Carolina 27516
(919) 933-5300

TODD A. COX*
NAACP Legal Defense
& Educational Fund, Inc.
1444 I Street, N.W., 10th Floor
Washington, D.C. 20005
(202) 682-1300

ELAINE R. JONES
Director-Counsel
NORMAN J. CHACHKIN
JACQUELINE A. BERRIEN
NAACP Legal Defense
& Educational Fund, Inc.
99 Hudson Street, Suite 1600
New York, New York 10013
(212) 219-1900

*Counsel of Record

Counsel for Applicants

No. 97-893

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1997

JAMES B. HUNT, JR., *et al.*,
Appellants,

v.

MARTIN CROMARTIE, *et al.*,
Appellees.

CERTIFICATE OF SERVICE

I, Todd A. Cox, a member of the Bar of this Court, hereby certify that on this 2nd day of October, 1998, served by first-class mail, postage prepaid, a true and correct copy of the Motion of Alfred Smallwood, David Moore, William M. Hodges, Robert L. Davis, Jr., Jan Valder, Barney Offerman, Virginia Newell, Charles Lambeth, and George Simkins (Currently Defendant-Intervenors in the Court Below) to Intervene as Appellants in this Court to Robinson O. Everett, Suite 300 First Union National Bank Building, Post Office Box 586, Durham, North Carolina 27702 and Edwin M. Speas, Jr., Chief Deputy Attorney General and Tiare B. Smiley, Special Deputy Attorney General, North Carolina Department of Justice, Post Office Box 629, Raleigh, North Carolina 27602-0629, counsel for all of the appellants and appellees herein. I further certify that all parties required to be served have been served.

Todd A. Cox
NAACP Legal Defense
& Educational Fund, Inc.
1444 I Street, N.W., 10th Floor
Washington, D.C. 20005
(202) 682-1300

Counsel for Applicants

DISTRIBUTED
OCT 13 1998

ORIGINAL

Supreme Court, U.S.
FILED
OCT 13 1998
CLERK

No. 98-85

In the
Supreme Court of the United States
October Term, 1998

RECEIVED
OCT 13 1998
OFFICE OF THE CLERK
SUPREME COURT, U.S.

JAMES B. HUNT, JR., in his official capacity as Governor of the State of North Carolina, *et al.*,

Appellants,

v.

MARTIN CROMARTIE, *et al.*,

Appellees.

RESPONSE OF APPELLANTS IN SUPPORT OF MOTION BY SMALLWOOD, *ET AL.*, TO INTERVENE AS APPELLANTS

Appellants, James B. Hunt, Jr., *et al.*, by their undersigned counsel, respond to the motion to intervene as appellants in this action by Alfred Smallwood, *et al.*, by supporting such intervention. The *Smallwood* appellants are currently defendant-intervenors in the court below and have important interests which the disposition of this appeal will affect. Intervention will not delay the appeal of this matter and, for the reasons stated in their motion, the *Smallwood* parties should be allowed to intervene as appellants in this appeal.

Respectfully submitted, this 7th day of October, 1998.

MICHAEL F. EASLEY
North Carolina Attorney General

Edwin M. Speas, Jr.
Chief Deputy Attorney General

Tiare B. Smiley
Special Deputy Attorney General

Melissa Saunders
Special Counsel to the Attorney General

North Carolina Department of Justice
Post Office Box 629
Raleigh, NC 27609-0629
(919) 716-6900

COUNSEL FOR APPELLANTS

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
EASTERN DIVISION
CIVIL NO. 4:96CV104-BO(3)

FILED
JUN 22 1998
DAVID W. DANIEL, CLERK
U.S. DISTRICT COURT
E. DIST. NO. CAR.

MARTIN CROMARTIE, et al.,

Plaintiffs,

v.

JAMES B. HUNT, JR., in his capacity as Governor of the State of North Carolina, et al.,

Defendants.

ORDER

THIS MATTER is before the Court on "Motion Of Alfred Smallwood, David Moore, William M. Hodges, Robert L. Davis, Jr., Jan Valder, Barney Offerman, Virginia Newell, Charles Lambeth and George Simkins To Intervene" filed November 26, 1997 and "Second Renewed Motion Of Alfred Smallwood, David Moore, William M. Hodges, Robert L. Davis, Jr., Jan Valder, Barney Offerman, Virginia Newell, Charles Lambeth, and George Simkins For Leave To Intervene As Defendant" filed May 26, 1998. Defendants in this action have filed a response indicating that they do not object to the motions. Plaintiffs have not filed a written response.

Upon review of both motions, the Court finds that the prospective intervenors meet the requirements of Rule 24(a) of the Federal Rules of Civil Procedure and are therefore entitled to intervene as of right in this action.

BEST AVAILABLE COPY

IT IS, THEREFORE, ORDERED that the "Motion Of Alfred Smallwood, David Moore, William M. Hodges, Robert L. Davis, Jr., Jan Valder, Barney Offerman, Virginia Newell, Charles Lambeth and George Simkins To Intervene" and "Second Renewed Motion Of Alfred Smallwood, David Moore, William M. Hodges, Robert L. Davis, Jr., Jan Valder, Barney Offerman, Virginia Newell, Charles Lambeth, and George Simkins For Leave To Intervene As Defendant" are GRANTED.

IT IS FURTHER ORDERED that leave of Court is GRANTED for Defendant-Intervenors to file their proposed amended answer.

THIS the 22nd day of June, 1998.

SAM J. ERVIN, III
United States Circuit Judge
TERRENCE W. BOYLE
Chief United States District Judge
RICHARD L. VOORHEES
United States District Judge

By: Terrence W. Boyle
TERRENCE W. BOYLE
Chief United States District Judge

(7)

FILED
NOV 9 - 1998
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 98-85

In the Supreme Court of the United States

OCTOBER TERM, 1998

JAMES B. HUNT, JR., ET AL., APPELLANTS

v.

MARTIN CROMARTIE, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING APPELLANTS

SETH P. WAXMAN
Solicitor General
Counsel of Record
WILLIAM R. YEOMANS
Acting Assistant Attorney General
BARBARA D. UNDERWOOD
Deputy Solicitor General
JAMES A. FELDMAN
Assistant to the Solicitor General
DAVID K. FLYNN
LOUIS E. PERAERTZ
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

34 pp

QUESTIONS PRESENTED

1. Whether the State's evidence of a nonracial motive for the drawing of District 12 in the State's 1997 congressional redistricting plan was sufficient to preclude summary judgment for appellees on their challenge to District 12 under *Shaw* v. *Reno*.

2. Whether principles of res judicata preclude appellees from bringing the claims they assert in this suit.

TABLE OF CONTENTS

	Page
Interest of the United States	1
Statement	2
Summary of argument	9
Argument:	
I. The district court's summary judgment order was based upon its failure to follow priniciples this court held must be applied when determining whether an election district constitutes a racial gerrymander	11
A. Where the defendant in a *Shaw* case offers a non-racial explanation for a district's configuration, the mere coincidence of the district's lines with racial demographics is insufficient to warrant summary judgment for the plaintiff	11
B. Because the state offered ample evidence that achieving a partisan objective—not race—was the predominant motive in drawing District 12, the district court erred in ruling that appellees were entitled to judgment as a matter of law	14
II. The record in this case is insufficient to show that claim preclusion principles barred appellee's claim	27
Conclusion	30

TABLE OF AUTHORITIES

Cases:

Ahng v. *Allsteel, Inc.*, 96 F.3d 1033 (7th Cir. 1996)	29
Anderson v. *Liberty Lobby, Inc.*, 477 U.S. 242 (1986)	11, 12, 15
Benson & Ford, Inc. v. *Wanda Petroleum Co.*, 833 F.2d 1172 (5th Cir. 1987)	29

Cases—Continued: Page

Bush v. *Vera*, 517 U.S. 952 (1996) 8, 13, 14, 16, 21, 22, 23, 25, 26
Celotex Corp. v. *Catrett*, 477 U.S. 317 (1986) 11
Chase Manhattan Bank v. *Celotex Corp.*, 56 F.3d 343 (2d Cir. 1995) 29
Eastman Kodak Co. v. *Image Technical Servs., Inc.*, 504 U.S. 451 (1992) 11
Federated Dep't Stores, Inc. v. *Moitie*, 452 U.S. 394 (1981) 27
Gaffney v. *Cummings*, 412 U.S. 735 (1973) 13, 16
Gonzalez v. *Banco Cent. Corp.*, 27 F.3d 751 (1st Cir. 1994) 28, 29
Jaffree v. *Wallace*, 837 F.2d 1461 (11th Cir. 1988) 28
Lawyer v. *Department of Justice*, 117 S. Ct. 2186 (1997) 15
Miller v. *Johnson*, 515 U.S. 900 (1995) 8, 12, 15, 22, 24
Nordhorn v. *Ladish Co., Inc.*, 9 F.3d 1402 (9th Cir. 1993) 28
Richards v. *Jefferson County*, 517 U.S. 793 (1996) 28
Shaw v. *Hunt*, 861 F. Supp. 408 (E.D.N.C. 1994), rev'd on other grounds, 517 U.S. 899 (1996) 4, 5
Shaw v. *Hunt*, 517 U.S. 899 (1996) 2, 3, 6, 8, 11, 13, 17, 27, 28
Shaw v. *Reno*, 509 U.S. 630 (1993) 2, 9, 12, 15, 18
United States v. *Hays*, 515 U.S. 737 (1995) 6, 27

Constitution and statute:

U.S. Const.:
Amend. XIV (Equal Protection Clause) 1, 2, 12
Voting Rights Act of 1965, 42 U.S.C. 1973 *et seq.* 1, 2
§ 2, 42 U.S.C. 1973 ..... 1, 2
§ 5, 42 U.S.C. 1973c 1, 2

Miscellaneous:

Michael Barone, *et al.*, *The Almanac of American Politics 1998* (1997) 19

In the Supreme Court of the United States

OCTOBER TERM, 1998

No. 98-85

JAMES B. HUNT, JR., ET AL., APPELLANTS

v.

MARTIN CROMARTIE, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING APPELLANTS

INTEREST OF THE UNITED STATES

This case concerns the standards a federal court should apply when determining whether a state election districting plan was drawn predominantly on the basis of race, in violation of the Equal Protection Clause of the Fourteenth Amendment. The United States enforces Sections 2 and 5 of the Voting Rights Act of 1965 (42 U.S.C. 1973, 1973c), which require, in part, that States and political subdivisions not engage in voting practices that deny citizens an equal opportunity to elect representatives of their choice on account of their race. Those statutes sometimes require States to take the racial consequences of their districting decisions into account. The United States has an interest in ensuring that States have reasonable leeway to design

districts that comply with both the Voting Rights Act and the Equal Protection Clause. The United States has participated in prior appeals in related litigation. The United States was a party-defendant in *Shaw* v. *Reno*, 509 U.S. 630 (1993), and filed a brief as *amicus curiae* in *Shaw* v. *Hunt*, 517 U.S. 899 (1996).

STATEMENT

Appellees challenged the First and Twelfth Districts in North Carolina's 1997 congressional redistricting plan, which was enacted as a remedy for the plan this Court held unconstitutional in *Shaw* v. *Hunt*, 517 U.S. 899 (1996) (*Shaw II*). Appellees alleged that the challenged districts were drawn in violation of the Equal Protection Clause. The district court granted summary judgment to appellees with regard to the Twelfth District, holding that undisputed facts demonstrated that "the General Assembly utilized race as the predominant factor in drawing the District." J.S. App. 22a.

1. a. In *Shaw II*, this Court struck down North Carolina's 1992 congressional districting plan under the equal protection clause of the Fourteenth Amendment. The Court held that District 12 in that plan was drawn predominantly on the basis of race, 517 U.S. at 907, and that it did not satisfy strict scrutiny, because the record did not show a compelling interest in remedying past discrimination or complying with Sections 2 and 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973 and 1973c. 517 U.S. at 910-918. The *Shaw* plaintiffs had also attacked District 1 of the 1992 plan. This Court held, however, that it lacked jurisdiction to address the constitutionality of District 1, because none of the plaintiffs resided in that district. *Id.* at 904.

b. On July 3, 1996, a few weeks after *Shaw II* was decided, three residents of District 1 in the 1992 plan—

Martin Cromartie, Thomas Chandler Muse, and another plaintiff who has since dismissed her claim—filed this action, alleging that District 1 of the 1992 plan was also a racial gerrymander. J.S. App. 3a. The district court stayed this case pending the outcome of the remand proceedings in *Shaw*. On July 9, 1996, Cromartie, Muse, and the third plaintiff also joined the plaintiffs in *Shaw* on remand and filed an amended complaint in that case also challenging District 1. *Ibid.*

c. The district court in *Shaw* afforded the North Carolina General Assembly the opportunity to enact a plan that was constitutional, and the Assembly established Senate and House redistricting committees to complete the task. In North Carolina, the Senate has a Democratic majority and the House has a Republican majority. State Senator Roy A. Cooper, III, and State Representative W. Edwin McMahan, the chairmen of the Senate and House redistricting committees, have provided affidavits detailing the goals and purposes of the committees. J.S. App. 69a-78a (Cooper); *id.* at 79a-84a (McMahan). Both explain that their respective committees shared the same goals: to "cure the defects in the old plan and at the same time preserve the existing partisan balance (6 Republicans and 6 Democrats) in the State's congressional delegation." *Id.* at 81a (McMahan); see also *id.* at 71a-72a (Cooper). Cooper and McMahan's committees worked together to achieve those goals. *Id.* at 72a, 81a.

In order to cure the constitutional defects of the old plan, emphasis was placed upon the following districting criteria: "(1) avoidance of division of precincts; (2) avoidance of the division of counties when reasonably possible; (3) functional compactness (grouping together citizens of like interests and needs); (4) avoidance of long narrow corridors connecting concentrations of

minority citizens; and (5) ease of communication among voters and their representatives." J.S. App. 72a; see also *id.* at 81a. In designing the plan to maintain the partisan balance in the State's congressional delegation, State Senator Cooper explained that "election results were the principal factor which determined the location and configuration of all districts in [the plan] so that a partisan balance which could pass the General Assembly could be achieved." *Id.* at 73a. Representative McMahan also stated that "[t]he means I used to check on the partisan nature of proposed new districts was the election results in the General Assembly's computer data base" and "more recent election results." *Id.* at 81a-82a. Both legislators acknowledged that, in the development of the plan as a whole, "[r]acial fairness was considered," because of the legislators' "[o]bligations to represent all of our constituents of all races and to comply with the Voting Rights Act." *Id.* at 77a, 83a. But both attested that "partisan election data, not race, was the predominant basis for assigning precincts to districts including precincts in Districts 1 and 12." *Id.* at 77a; see also *id.* at 83a.

The 1997 plan overall divides two of 2,531 precincts (J.S. App. 72a, 117a) and 22 of the State's 100 counties. *Id.* at 72a, 116a. All of its districts are contiguous, and the plan does not employ artificial devices such as "cross-overs" and "double cross-overs" to achieve contiguity.[1] *Id.* at 72a, 114a. District 12, in particular, has

[1] A "point contiguity," which we understand to be the same as a "cross-over," occurs "when the political or census block boundaries that are being used to define the boundaries [of a district] happen to touch only at a single 'point.'" *Shaw* v. *Hunt*, 861 F. Supp. 468, 468 (E.D.N.C. 1994), rev'd on other grounds, 517 U.S. 899 (1996). A "double cross-over" is "a point of contiguity that allows two districts essentially to cross over each other," creating an "X"-shaped pattern on a map. *Id.* at 468.

the following features: (1) it divides one precinct ("a precinct in Mecklenburg County that was divided in every local districting plan," *id.* at 74a); (2) its length, as compared with the corresponding District 12 in the unconstitutional 1992 plan, was reduced by 46% from 191 miles to 102 miles; (3) the number of counties in the district was reduced from 10 to 6; (4) all cross-overs, double cross-overs and points of contiguity were eliminated; and (5) its geographic scope was limited to the citizens in Charlotte and the cities of the Piedmont Urban Triad.[2] *Ibid.*

As a result of the efforts to make District 12 a strong Democratic district, 75% of the district's registered voters are Democrats and at least 62% of the voters residing in the district voted for the Democratic candidate in the 1990 United States Senate election, the 1988 Lieutenant Governor election, and the 1988 election for one seat on the court of appeals. J.S. App. 99a. District 12 is not a majority-minority district. African-Americans comprise 43% of the voting age population, 46% of the registered voters in the district, and 47% of the total population of the district. J.S. App. 6a & n.2. Twelve of the 17 African-American members of North Carolina's House of Representatives voted against the 1997 plan. *Id.* at 83a.

The plan was enacted by the legislature on March 31, 1997, despite an earlier belief by many that the party division between the two houses of the legislature would make enactment of a plan impossible. J.S. App. 71a, 76a, 80a, 82a. On June 9, 1997, the Department of

[2] The Piedmont Urban Triad apparently consists of the neighboring cities of Winston-Salem, High Point, and Greensboro.

Justice precleared the plan pursuant to Section 5 of the Voting Rights Act. *Id.* at 162a.

2. On September 12, 1997, the three-judge panel on remand from this Court in *Shaw* approved the 1997 plan. J.S. App. 157a-168a. With respect to District 12 in the new plan, the *Shaw* plaintiffs, relying on this Court's decision in *United States* v. *Hays*, 515 U.S. 737 (1995), asserted that they did not live within the district's boundaries and therefore disclaimed standing to challenge the district. See J.S. App. 163a. The *Shaw* court, while "doubtful" that they lacked standing, *id.* at 166a, concluded that it would approve the plan as an adequate remedy "on the simple basis that its adequacy * * * has not been challenged by any party to the litigation." *Ibid.* The court noted, however, that its approval of the plan "does not—cannot—run beyond the plan's remedial adequacy with respect to [the parties before the court] and the equal protection violation found as to former District 12." *Id.* at 167a.

3. On October 17, 1997, the district court in this case dissolved its stay, permitting the litigation to proceed. See J.S. App. 4a. That same day, two of the original three plaintiffs in this case—Cromartie and Muse—and four residents of District 12—Everett, Froehlich, Linville, and Hardaway—filed an amended complaint seeking a declaratory judgment that both Districts 1 and 12 of the 1997 redistricting plan are unconstitutional racial gerrymanders. *Ibid.* Plaintiffs moved for a preliminary injunction on January 30, 1998, and for summary judgment on February 5, 1998. *Ibid.* The State opposed those motions and filed its own motion for summary judgment. *Id.* at 4a-5a.

On April 3, 1998, the three-judge court entered a summary order in which it granted the plaintiffs' motion for summary judgment that District 12 was unconstitutional and enjoined the State from holding any elections under the 1997 congressional plan. J.S. App. 45a-46a. The court denied the plaintiffs' motion as to District 1. *Id.* at 22a-23a. On April 6, the State noticed its appeal from the order and filed an emergency application in this Court for a stay of the order pending appeal. *Id.* at 47a. On April 13, 1998, before the district court had issued its memorandum opinion, this Court denied the stay application, with Justices Stevens, Ginsburg, and Breyer dissenting. 118 S. Ct. 1510.

On April 14, 1998, the district court issued a memorandum opinion in support of its summary judgment order. J.S. App. 1a-44a. The court rejected North Carolina's argument that District 12 was "designed with politics and partisanship, not race, in mind." *Id.* at 20a. The court did not discuss the State's evidence—presented in affidavits by legislators and an expert statistical analysis—that the predominant motive for the configuration of District 12 was not race, but a desire to create a solidly Democratic district as measured by the results of past elections. Relying instead on appellees' evidence regarding party registration, the court stated that, "[a]s the uncontroverted material facts demonstrate, * * * the legislators excluded many heavily-Democratic precincts from District 12, even though those precincts immediately border the District." *Ibid.* The court also noted that the counties and cities that are split by District 12 generally contain substantially greater proportions of African-Americans within the district boundaries than are left outside of them. *Ibid.* The court also found that "objective measures of the compactness of District 12 reveal that it is still the most geographically scattered of North Carolina's congressional districts." *Ibid.*; see also *id.* at 9a-11a.

Judge Ervin dissented. J.S. App. 25a-44a. He concluded that the plaintiffs were not entitled to summary judgment because there was no direct evidence to contradict the state legislators' proffered non-racial justifications. *Id.* at 29a. He noted that there are significant differences between District 12 and the districts held unconstitutional in *Bush* v. *Vera*, 517 U.S. 952 (1996), *Shaw II*, and *Miller* v. *Johnson*, 515 U.S. 900 (1995). J.S. App. 29a. As he pointed out, "North Carolina's twelfth congressional district is not a majority-minority district, it was not created as a result of strong-arming by the U.S. Department of Justice, and, contrary to the majority's assertions, it is not so bizarre or unusual in shape that it cannot be explained by factors other than race." *Id.* at 25a.

Judge Ervin also found the statistical evidence presented by Dr. Peterson, the State's expert, more persuasive than the plaintiffs' evidence, because Dr. Peterson examined the entire circumference of District 12, "looking at both the party affiliation and racial composition of the precincts on either side of the district line," whereas the plaintiffs merely picked certain examples on District 12's boundary in which the legislature had included precincts with large African-American populations. J.S. App. 34a-35a. Judge Ervin also argued that "the majority's decision to look only at the percentage of registered Democrats in analyzing the district's borders ignores the fact that registered Democrats are not compelled to vote for Democratic candidates and often do not." *Id.* at 37a. He referred instead both to direct evidence from legislators and circumstantial evidence provided by Dr. Peterson's study that the legislature had relied on "the history of recent voting patterns in an attempt to design the

districts to ensure that the partisan balance would remain stable." *Id.* at 38a.

SUMMARY OF ARGUMENT

The district court granted summary judgment to appellees, based on evidence that District 12 was less regular in shape than other districts in North Carolina and that District 12 had a substantially larger African-American population than surrounding districts, dividing various counties and cities in a way that correlated with race. The court rejected the State's explanation that the predominant motive for District 12's configuration was not race, but politics, on the ground that the district failed to include a number of adjoining, largely white precincts with large percentages of registered Democrats.

The record was inadequate to support appellees' summary judgment motion. In determining whether strict scrutiny applies to a district challenged under *Shaw* v. *Reno*, the ultimate inquiry is whether race was the predominant motive underlying the challenged district, such that traditional districting principles were subordinated to race. Evidence of a coincidence of irregular borders with a large African-American population is in some circumstances sufficient to support an inference that a legislature's predominant motive was race, although that inference is weakened when, as here, the district is not a majority-minority district. But such circumstantial evidence is surely insufficient to support summary judgment where the State has offered an alternative, non-racial explanation for the district's configuration. In this case, the State did so, when it offered evidence that the predominant motive for the district's configuration was to create a solidly Democratic district based on past voting patterns, as

part of an overall plan to achieve partisan balance in the State's districting. The State supported that explanation with direct evidence, in the form of affidavits of those who drew the plan, and indirect evidence, in the form of a detailed expert study of the district's lines by Dr. Peterson. That was more than ample to create a genuine issue of material fact as to whether race or the achievement of a particular partisan result was the State's predominant motive in configuring the district as it did. The district court therefore erred in granting summary judgment to appellees.

The primary evidence upon which the district court relied to reject the State's partisan explanation for District 12's configuration was that District 12 fails to include some neighboring, majority-white precincts with majorities of voters registered as Democrats. The district court's reliance on that evidence was mistaken. First, the State never purported to rely on *registration* figures to achieve its partisan goals; rather, the State's direct and circumstantial evidence was that it drew District 12 based on *actual past election results*. Accordingly, any lack of correlation between District 12's boundaries and areas with high Democratic registration would be of minimal significance. Second, in light of the complexities of redistricting and the multiple goals a state legislature necessarily pursues, selective examples of a relatively small number of precincts that were not included in the district could not be sufficient—either generally or on the record in this case—to refute a State's convincing evidence that the district as a whole was drawn for partisan purposes. Accordingly, the district court erred in granting summary judgment to appellees.

The State also has argued that appellees' claims in this case are in any event barred by the results of the

earlier *Shaw* litigation. Four of the appellees in this case, however, were not parties in *Shaw*. The record evidence to show that those four plaintiffs were barred —primarily that they were represented by the same attorney and advanced a similar claim—is insufficient to support application of claim preclusion doctrines against them.

ARGUMENT

THE DISTRICT COURT'S SUMMARY JUDGMENT ORDER WAS BASED UPON ITS FAILURE TO FOLLOW PRINCIPLES THIS COURT HELD MUST BE APPLIED WHEN DETERMINING WHETHER AN ELECTION DISTRICT CONSTITUTES A RACIAL GERRYMANDER.

A. Where The Defendant In A *Shaw* Case Offers A Non-racial Explanation For A District's Configuration, The Mere Coincidence Of The District's Lines With Racial Demographics Is Insufficient To Warrant Summary Judgment For The Plaintiff

1. This case is before the Court on the district court's grant of summary judgment to appellees. Because a grant of summary judgment is a legal, not a factual, determination, an appellate court must review a grant of summary judgment *de novo*. See *Eastman Kodak Co.* v. *Image Technical Servs., Inc.*, 504 U.S. 451, 465 n.10 (1992). The district court was justified in granting summary judgment only if there was no genuine issue of fact that is material to the cause of action. See *Celotex Corp.* v. *Catrett*, 477 U.S. 317, 324 (1986); *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). Where, as here, the non-movant produces evidence in opposition to the motion for summary judgment, that evidence "is to be believed, and all

justifiable inferences are to be drawn in [the nonmovant's] favor." *Id.* at 255. The applicable substantive law determines which facts are material. *Anderson*, 477 U.S. at 248.

2. In this case, the constitutionality of District 12 turns on whether it is subject to strict scrutiny under the Equal Protection Clause, since the question whether the district was narrowly tailored to achieve a compelling state interest was not litigated by the parties or decided by the district court. The applicable substantive law on that point is provided by this Court's decisions in *Shaw* v. *Reno*, 509 U.S. 630 (*Shaw I*), and the cases that have followed it. In *Shaw I*, the Court held that strict scrutiny applies if "redistricting legislation * * * is so extremely irregular on its face that it rationally can be viewed only as an effort to segregate the races for purposes of voting, without regard for traditional districting principles." *Id.* at 642. In *Miller* v. *Johnson*, 515 U.S. 900 (1995), the Court clarified that the application of strict scrutiny in a *Shaw* case does not necessarily depend on examination of a map; although shape and racial demographics may provide "circumstantial evidence," strict scrutiny applies only if "race for its own sake, and not other districting principles, was the legislature's dominant and controlling rationale." *Id.* at 913. Strict scrutiny does not apply unless the plaintiff shows, either through direct evidence of legislative motive or through indirect evidence of shape and demographics, that "the legislature subordinated traditional race-neutral districting principles * * * to racial considerations." *Id.* at 916.

Since the inquiry in this case turns on the legislature's predominant motive, a plan would not be subject to strict scrutiny merely because the legislature that

enacted it was aware of the racial demographics of the plan, or even because race was one of the legislature's motives in crafting the district. See *Bush* v. *Vera*, 517 U.S. 952, 958 (1996) (plurality opinion) (strict scrutiny not triggered merely because "redistricting is performed with consciousness of race" or because the plan is the result of the "intentional creation of majority-minority districts"). Nor does the correlation of a district's lines with race necessarily render the district constitutionally suspect. *Id.* at 968. If a State offers legitimate explanations other than race for a district's configuration, a court must carefully examine the proffered explanations to determine whether the "race-neutral, traditional districting considerations predominated over racial ones." *Id.* at 964; see also *Shaw II*, 517 U.S. 899, 905 (1996) ("The Constitutional wrong occurs when race becomes the 'dominant and controlling' consideration.").

In this case, the State acknowledged that the legislators who drew District 12 considered race in analyzing the district's configuration. See J.S. App. 77a (affidavit of Sen. Cooper), 83a (affidavit of Rep. McMahan). But the State offered both direct and circumstantial evidence that the *predominant* motive of the legislators was not race, but rather to give District 12 a solidly Democratic character, so that the desired partisan balance could be achieved in the State's congressional delegation as a whole. Cf. *Gaffney* v. *Cummings*, 412 U.S. 735, 752 n.18 (1973). The plurality in *Bush* articulated the principles that govern such a case. "If the State's goal is otherwise constitutional political gerrymandering, it is free to use * * * precinct general election voting patterns, precinct primary voting patterns, and legislators' experience * * * to achieve that goal regardless of its awareness of its racial

implications." 517 U.S. at 968. Indeed, "[i]f district lines merely correlate with race because they are drawn on the basis of political affiliation, which correlates with race, there is no racial classification to justify." *Id.* at 968. Only if the evidence demonstrates "that racially motivated gerrymandering had a qualitatively greater influence on the drawing of district lines than politically motivated gerrymandering" or that "political gerrymandering was accomplished in large part by the use of race as a proxy" is a district subject to strict scrutiny. *Id.* at 969.

B. Because The State Offered Ample Evidence That Achieving A Partisan Objective—Not Race—Was The Predominant Motive In Drawing District 12, The District Court Erred In Ruling That Appellees Were Entitled to Judgment As A Matter Of Law

1. In this case, appellees presented, and the district court relied upon, circumstantial evidence showing that: (1) District 12's boundary tends to split towns and counties such that areas with 40% or greater African-American population are included in the district, see J.S. App. 9a-10a, 20a; (2) District 12 does not include some abutting precincts with Democratic registrations in excess of 50% and African-American populations less than 35%, see *id.* at 8a-9a, 20a; (3) District 12 is irregular in shape and, based on some objective measures of geographical compactness, it is the least compact district in North Carolina's 1997 plan and less compact than some other challenged districts in other States, see *id.* at 9a-11a, 20a-21a; and (4) District 12 connects communities that have not been joined in a congressional district in recent years, other than in the 1992 plan, see *id.* at 19a.

2. Those facts raise an inference that race was a factor in drawing the district. See *Miller*, 515 U.S. at 913. Even at this stage of the analysis, however, it is significant that District 12—with a 43% African-American voting age population and a 47% total African-American population—is not a majority-minority district. The harms caused by a *Shaw* violation—that it "reinforces racial stereotypes and threatens to undermine our system of representative democracy by signaling to elected officials that they represent a particular racial group rather than their constituency as a whole," *Shaw I*, 509 U.S. at 650 —are far less likely to occur in non-majority-minority districts. As the Court explained in *Lawyer* v. *Department of Justice*, 117 S. Ct. 2186 (1997), "the fact that [the challenged district] is not a majority black district * * * supports the * * * finding that the district is not a 'safe' one for black-preferred candidates, but one that offers to any candidate, without regard to race, the opportunity to seek and be elected to office." *Id.* at 2195 (internal quotation marks omitted). Because this fact makes appellees' proffered inference of predominant racial motive significantly less plausible, it increases appellees' burden at the summary judgment stage. Cf. *Anderson*, 477 U.S. at 249; see also *Miller*, 515 U.S. at 916-917 ("[C]ourts must * * * recognize * * * the intrusive potential of judicial intervention into the legislative realm, when assessing under the Federal Rules of Civil Procedure the adequacy of a plaintiff's showing at the various stages of litigation."). Indeed, there is a risk that an overly aggressive application of *Shaw* to non-majority-minority districts could have harmful consequences that are the reverse of those discussed by the *Shaw* Court, for it could send an unwarranted message that legislators must affirma-

tively avoid placing concentrations of minority group members together in a district.

Assuming, however, that appellees' evidence was sufficient to raise an inference of predominant racial motive, that inference was countered by the State. The State filed affidavits containing substantial evidence that a desire to achieve certain partisan political outcomes—not race—was the predominant motive underlying the configuration of District 12. Cf. *Bush*, 517 U.S. at 964; *Gaffney*, 412 U.S. at 751-754. That evidence consisted of both direct evidence of the legislature's motives in drawing the district, and circumstantial, demographic evidence regarding the constitution of the district as drawn.

a. The direct evidence consisted of affidavits in which the two legislators who were responsible for the plan—Senator Cooper, the Chairman of the Senate Redistricting Committee, and Representative McMahan, the Chairman of the House Redistricting Committee—explained how it was drawn. Senator Cooper stated that, because "[r]edistricting generally is a task which becomes extremely partisan," there was only a "single path by which a compromise [between the Democratic-controlled Senate and the Republican-controlled House] might be reached and a new plan adopted." J.S. App. 71a. That was to "cure the defects in the old plan and at the same time preserve the existing partisan balance in the State's congressional delegation." *Ibid.*; see also *id.* at 81a (Rep. McMahan).

To cure the constitutional defects in the prior plan, Senator Cooper stated that he intended to avoid dividing precincts or counties where possible, to "group[] together citizens of like interests and needs," to avoid "long narrow corridors connecting concentrations of minority citizens," and to draw districts in

which there would be "ease of communication among voters and their representatives." J.S. App. 72a; see also *id.* at 81a (Rep. McMahan). He stated unequivocally, however, that "election results were the *principal factor* which determined the location and configuration of all districts" in the Senate's preliminary plan, entitled Plan A. *Id.* at 73a (emphasis added); see also *id.* at 81a-82a.[3] Senator Cooper stated that Plan A was then modified to avoid placing various incumbents in districts with each other, to strengthen the Democratic support in the two districts that were substantially reconfigured because they had been challenged in *Shaw*, and to address other partisan concerns presented by a similar plan that the House had adopted. *Id.* at 75a, 76a-77a; see also *id.* at 82a (Rep. McMahan).

Senator Cooper acknowledged that he was aware of race in devising the plan. He stated that what he termed "[r]acial fairness" was "considered in the development of the plan." J.S. App. 77a; see also *id.* at 83a (Rep. McMahan).[4] He added, however, that "race for

---

[3] The House and Senate apparently used somewhat different sets of election results. Representative McMahan stated that "[t]he means I used to check on the partisan nature of proposed new districts was the election results in the General Assembly's computer data base (the 1990 Helms-Gantt election and the 1988 elections for Lieutenant Governor and one of the Court of Appeals seats)." J.S. App. 81a-82a. Senator Cooper stated that his "tool[s]" were "election results gathered and analyzed by the National Committee for an Effective Congress (NCEC)," which were "based on the results of a series of elections from 1990 to 1996," and "older election results contained in the legislative computer data base." *Id.* at 73a. Neither Senator Cooper nor Representative McMahan stated that he relied on voter registration data.

[4] Senator Cooper and Representative McMahan explicated "racial fairness" in terms of their responsibilities to "represent all of our constituents of all races and to comply with the Voting

the sake of race was not the dominant or controlling factor in the development or enactment of the plan." *Id.* at 77a; see also *id.* at 83a (Rep. McMahan). He stated that the fact "[t]hat a large proportion of precincts assigned to District 12 have significant black populations is simply the result of a strong Democratic voting pattern among blacks." *Id.* at 77a. "In drawing initially Congressional Plan A and in negotiating the eventually enacted plan, partisan election data, not race, was the *predominant* basis for assigning precincts to districts including precincts in Districts 1 and 12." *Ibid.* (emphasis added); see also *id.* at 83a (Rep. McMahan) ("dominant and controlling factors" were "curing the constitutional defects in the prior plan" and "protecting the existing partisan balance").[5] The evidence showed that District 12 in fact had a 62% to 75% Democratic population, depending on the measure used. See *id.* at 99a.

The affidavits of Senator Cooper and Representative McMahan directly support the State's contention that the configuration of District 12 was primarily the result of partisan motives, not race, and that the correlation between the district boundaries and race was the result of "a strong Democratic voting pattern among blacks." J.S. App. 77a. The affidavits also make clear that the State achieved its partisan objectives by relying on statistics regarding actual past elections—not voter

---

Rights Act," J.S. App. 77a, 83a—a goal that obviously comprehends the principles this Court announced in *Shaw* and its progeny, as well as the principles underlying the Voting Rights Act.

[5] As evidence that race was not the controlling factor, Representative McMahan referred to "the fact that 12 of the 17 members of the House who are black voted against [the plan]." J.S. App. 83a.

registration figures. That choice was, of course, reasonable, particularly in a State in which Democratic registration consistently overstates actual Democratic voting strength in elections.[6]

b. The State also offered circumstantial evidence that corroborated the undisputed direct evidence that partisan politics—not race—was the predominant factor in drawing District 12. The State filed an affidavit by Dr. David W. Peterson, an expert statistician, who was asked "to determine whether, based on the statistical pattern of association relating the boundary of the Twelfth District and the racial and political makeup of nearby residents, race appears to have been the predominant factor in defining that boundary." J.S. App. 86a. Dr. Peterson used the results of three recent elections, as well as party registration figures, to determine political affiliation on a precinct-by-precinct basis in the district. See *id.* at 89a.

Dr. Peterson concluded both that there is a "tendency * * * to include precincts within the District which have relatively high Democratic party representation" and that there is a "tendency * * * to include precincts within the District which have relatively high black representation." J.S. App. 87a. The

---

[6] For example, in 1996, 54% of the State's voters were registered as Democrats, while only 34% were Republicans. Michael Barone, *et al.*, *The Almanac of American Politics 1998*, at 1056 (1997). Yet the Republican candidates won in the 1992 and 1996 presidential elections, the State's two Senators are both Republicans (although a Democrat defeated one of them in the 1998 election), and the State's delegation to the 105th Congress consisted of six Republicans and six Democrats. *Id.* at 1057. In the November 1998 election, the Republicans gained a seat in North Carolina, and the delegation to the 106th Congress will therefore consist of seven Republicans and five Democrats.

coexistence of those two tendencies is explained because there is also "a substantial correlation * * * between the fraction of a precinct's residents who are black and the fraction who favor the Democratic political party over the Republican." *Id.* at 88a. Ultimately, however, Dr. Peterson concluded that "there is no statistical indication that race was the predominant factor determining the border of the Twelfth District" because "there is at least one other explanation that fits the data as well as or better than race, and that explanation is political identification." *Id.* at 87a. Based on Dr. Peterson's analysis of those border precincts where the correlation [between blacks and Democrats] does not exist, he stated that the "boundary of the Twelfth District appears to have been drawn at least as much with the purpose of creating a Democratic majority within the District as with creating a black majority." *Id.* at 88a.[7] Indeed, he noted that, while the proportion

[7] Dr. Peterson's analysis proceeded by isolating 234 segments along the 12th District's boundary that each separated one inside precinct from one outside precinct. He analyzed the racial and political composition of these inside and outside precincts based on a variety of different measures of racial demographics (total population, voting age population, registered voters) and a variety of different measures of party affiliation (election results from three past elections and party registration). Regardless of which measures were used, it turned out that, for many of the segments of the district boundary, the precinct inside the district had a greater proportion of African-Americans *and* a greater proportion of Democrats than the precinct outside the district. He focused, however, on the segments of the district boundary in which that was not true—*i.e.*, in which the district boundary ran between a precinct that contained a higher proportion of African-Americans and a lower proportion of Democrats than the precinct on the other side of the line. Under his approach, the legislature's primary motivation would be tested by whether the legislative tended to include in District 12 the precinct with the larger proportion of African-Americans or the precinct with the larger proportion of Democrats. He found that the legislature chose the latter much more often than the former, leading him to conclude that "the statistical support for the Political Hypothesis is at least as strong as that for the Race Hypothesis, and, indeed, somewhat stronger." J.S. App. 98a. See also *id.* at 99a (reaching same conclusion based on a narrower sample of precincts).

of African-Americans in District 12 ranges from 43% to 47% (depending on whether total population, voting age population, or registered voters are considered), the proportion of Democrats ranges from 62% to 75% (depending on which election results were used). *Id.* at 99a. He explained that "[t]hese figures support the proposition that creation of a Democratic majority in District Twelve was a more important consideration in its construction than was the creation of a black majority." *Ibid.*

3. The consistent direct and circumstantial evidence presented by the State that partisan considerations—not race—was the predominant motive in shaping District 12 demonstrated that, with respect to the ultimate question in the case, there was at the very least a substantial factual dispute. As *Bush* teaches, "[i]f district lines merely correlate with race because they are drawn on the basis of political affiliation, which correlates with race, there is no racial classification to justify." 517 U.S. at 968. The State had explained appellees' evidence of the correlation between race and District 12's lines by showing that the predominant motive in drawing those lines was political affiliation, which itself had a correlation with race. Unless some other evidence in the record conclusively rebutted the State's direct and indirect evidence of a predominant political motive, the record simply could not support—much less

conclusively demonstrate as a matter of law—the district court's conclusion that the predominant motive underlying District 12 was race.

There was no such rebuttal evidence in the record. Appellees offered *no* direct evidence of motive. They did not, for example, offer evidence that the State's computers contained racial data at a "uniquely detailed" level that the legislature used "to make more intricate refinements on the basis of race than on the basis of other demographic information," as in *Bush*, 517 U.S. at 961, or evidence that the State legislature had an "overriding desire to comply" with Department of Justice pressure to create a certain number of majority-minority districts, as in *Miller*, 515 U.S. at 918. With regard to the State's circumstantial evidence contained in the Peterson affidavit, the district court acknowledged the State's claim that "political identification was the predominant factor determining the border of District 12." J.S. App. 20a. But the court rejected that claim on the ground that "the legislators excluded many heavily-Democratic precincts from District 12, even though those precincts immediately border the District." *Ibid.* The court also relied on the fact that District 12 is "the most geographically scattered of North Carolina's congressional districts" and that the legislature "disregarded * * * compactness in drawing District 12." *Id.* at 20a, 21a-22a.[8] Neither of the grounds

[8] The district court also appeared to believe that District 12 "disregarded * * * contiguity * * * [and] community of interest." J.S. App. 21a-22a. Senator Cooper stated that one of the State's express goals was achieving contiguity without the need for artificial "devices" like "cross-overs," "double cross-overs," and "points of contiguity." *Id.* at 72a. The district court did not explain any respect in which District 12 failed to achieve that goal, and we are aware of none. With respect to "community of interest," the State submitted evidence that the district joins together communities of Democratic voters in the urban cities of Charlotte, Greensboro and Winston-Salem. *Id.* at 63a-64a, 75a. The district court, which was obligated to draw all inferences in favor of the State on appellee's motion for summary judgment, had no basis to reject that evidence or to conclude that the communities of interest to which the State referred were in some way illegitimate. Certainly, the fact that these communities had not been joined in the past, see *id.* at 19a, could not disable the State from determining that a community of interest had now developed that was entitled to recognition. Cf. *Bush*, 517 U.S. at 966.

on which the district court relied addressed—much less refuted—the State's evidence that a desire to achieve a partisan political result was the predominant motive in drawing District 12.

a. The district court placed primary reliance on a listing of 32 precincts that abutted—but were not included in—District 12 and that had a relatively low African-American population (less than 35%) and a relatively high Democratic registration percentage (between 54% and 76%, with the overwhelming majority being between 55% and 60%). J.S. App. 8a. That evidence, however, was insufficient even to cast doubt on the State's evidence that partisan political considerations were the predominant motive in drawing District 12. The State had never purported to rely on party registration figures in drawing District 12; to the contrary, Senator Cooper and Representative McMahan were unequivocal that they had used actual election results to achieve the partisan balance that was the basis of the districting plan. See *id.* at 73a, 76a, 77a, 81a-82a. Dr. Peterson's analysis also primarily relied on actual election results in concluding that a partisan objective, rather than race, was the predominant factor explaining the configuration of District 12. *Id.* at 90a-

91a. Thus, even if the evidence relied on by the district court demonstrated conclusively that District 12's boundaries did not correlate with party registration figures, the State's evidence that partisan affiliation, as measured by actual election results, was the predominant motive would remain entirely unrebutted.

There is an additional flaw in the district court's reasoning. This Court has explained that "courts, in assessing the sufficiency of a challenge to a districting plan, must be sensitive to the complex interplay of forces that enter a legislature's redistricting calculus." *Miller*, 515 U.S. at 915-916. Indeed, in this very case, the State articulated a number of distinct goals it was trying to achieve in the redistricting legislation at issue, not merely the various partisan objectives (maintaining the overall partisan balance in the State's congressional delegation, avoiding contests pitting incumbents against each other, keeping each incumbent in his own district), but also maintaining population equality and advancing a variety of other objectives (avoiding precinct and county splits where possible, respecting communities of interest, facilitating ease of communication among voters and their representatives). In light of the sometimes complex interplay of these goals and the strictures of the one-person/one-vote rule, there will be few districts in which *every* line-drawing decision is explicable by reference to a single goal. Thus, even had the district court relied on actual election results rather than party registration, the fact that a relatively small number of Democratic precincts were excluded from District 12 would not in itself refute the State's contention that drawing a Democratic district was its

primary goal.[9] Before rejecting the State's evidence that politics, not race, drove the creation of District 12, a far more discerning inquiry must be undertaken, in which the district's configuration as a whole is carefully compared with the justifications offered.

b. The district court also relied on the fact that District 12 scored lower than did other North Carolina districts on two measures of compactness. J.S. App. 21a-22a. Those facts, however, could not result in a grant of summary judgment to appellees. In this respect, *Bush* is once again instructive.

The plurality in *Bush* accepted the district court's finding in that case that the Texas districts it was examining "have no integrity in terms of traditional, neutral redistricting criteria." 517 U.S. at 960. Indeed,

---

[9] In this case, for example, an examination of appellee's Exhibits M, O, and P, on which the district court based its analysis, reveals easy explanations for the alleged "exclusion" of most of the precincts with high Democratic registration percentages—even assuming that Democratic registration percentages were relevant in this case. Most of the "excluded" precincts have Democratic registration percentages of 55-60%, but border on precincts in District 12 that have much higher Democratic registration percentages, often 80-90% or above. Only one of the "excluded" precincts has a Democratic registration (76%, see J.S. App. 8a) that is higher than the average Democratic registration of District 12 as a whole (75%, see *id.* at 99a). In addition, including many of the "excluded" precincts would in many cases have made District 12's outside boundaries far more irregular. And one-person, one-vote principles, which place constraints on the total number of persons within a single congressional district, must be factored into the analysis. Although precincts may vary widely in population, the district court made no effort to calculate what alterations would have had to have been made in the district as a whole—and, in particular, whether District 12 would have retained its strong Democratic character—if it had been redrawn to include one or more of the "excluded" precincts.

the districts at issue in *Bush* had far less geographic coherence than District 12 in this case. Compare *id.* at 987-989 (maps of Texas districts in *Bush*) with J.S. App. 59a (map of District 12). The Court noted, however, that "[t]he Constitution does not mandate regularity of district shape, and the neglect of traditional districting criteria is merely necessary, not sufficient" to trigger strict scrutiny. 517 U.S. at 962 (citation omitted). Because Texas had introduced evidence that incumbency protection, as opposed to race, had been the basis for the neglect of traditional districting principles, the plurality proceeded to undertake a careful comparative inquiry into whether the asserted partisan concerns or race had been the predominant motive underlying the "bizarre" configuration of the challenged districts. See *id.* at 967-973 (Dallas area districts), 975-976 (Houston district). Notwithstanding the finding of a virtually total lack of geographic integrity, this further inquiry was necessary because, "[f]or strict scrutiny to apply, traditional districting criteria must be *subordinated to race*," not to other districting factors. *Id.* at 962. See also *id.* at 967 ("In some circumstances, incumbency protection might explain as well as, or better than, race a State's decision to depart from other traditional districting principles, such as compactness, in the drawing of bizarre district lines."). The district court disregarded *Bush* and erred in concluding that evidence regarding District 12's geography could refute the State's claim that that very geography was caused by politics, not race.

II. THE RECORD IN THIS CASE IS INSUFFICIENT TO SHOW THAT CLAIM PRECLUSION PRINCIPLES BARRED APPELLEES' CLAIM

A "final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action." *Federated Dep't Stores, Inc.* v. *Moitie*, 452 U.S. 394, 398 (1981). At the remedial phase of the *Shaw* litigation, the three-judge court in that case offered the parties an opportunity to challenge the State's 1997 redistricting plan, including District 12. The *Shaw* plaintiffs chose not to assert any claim of unconstitutionality, asserting that they would not have standing to do so under this Court's decision in *United States* v. *Hays*, 515 U.S. 737 (1995), because they did not live in that district. The State has claimed that, based on the *Shaw* litigation, appellees' claims are barred by principles of res judicata.

1. We share the doubts of the *Shaw* district court that standing principles could have barred the successful *Shaw* plaintiffs from challenging the constitutional adequacy of the remedy in that case, J.S. App. 166a, and thus agree that the claims of the two appellees who were also plaintiffs in *Shaw* may well be precluded here. Four of the appellees in this case reside in District 12 and were not parties in *Shaw*. If the claims of those four appellees are not precluded, the question whether the claims of the two appellees who were parties in *Shaw* would be precluded is of little consequence.

2. The record in this case is insufficient to support a finding that the claims of the four non-*Shaw* appellees are barred because they were "virtually represented" in the *Shaw* case. See J.S. 17. We agree with the State

that the broad standing rule that frequently applies in districting litigation creates the potential for burdensome, successive litigation, as well as for manipulation of the system by plaintiffs to obtain a desired judge or panel. We also agree with the State that the "virtual representation" theory of preclusion has been widely recognized by the courts of appeals as a construction of the traditional concept of "privity." See, *e.g.*, *Gonzalez* v. *Banco Cent. Corp.*, 27 F.3d 751, 757 (1st Cir. 1994); cf. *Richards* v. *Jefferson County*, 517 U.S. 793, 798 (1996) (res judicata may apply "when, in certain limited circumstances, a person, although not a party, has his interests adequately represented by someone with the same interests who is a party"). In an appropriate case, where the factual record is more fully developed, the application of the "virtual representation" theory to redistricting litigation could be more fully explored. In this case, however, the factual record is insufficient to support the State's "virtual representation" argument.

The record in this case discloses only that the four non-*Shaw* appellees were all represented by the same attorney who represented the plaintiffs in *Shaw*, that the legal theories underlying their claims are similar to those of the plaintiffs in *Shaw*, and that two other persons who were plaintiffs in this case were also parties in *Shaw*. None of the various formulations of the "virtual representation" theory by the courts of appeals would bar claims based on those facts. Application of the "virtual representation" theory of preclusion depends on issues such as whether the parties in the earlier and later cases were under common control, see, *e.g.*, *Gonzalez*, 27 F.3d at 758-760; *Nordhorn* v. *Ladish Co.*, 9 F.3d 1402, 1405-1406 (9th Cir. 1993); whether they had a familial, see, *e.g.*, *Jaffree* v. *Wallace*, 837 F.3d 1461, 1467 (11th Cir. 1988), or other legal relationship that aligned their interests and gave them an identical incentive to litigate, see, *e.g.*, *Chase Manhattan Bank* v. *Celotex Corp.*, 56 F.3d 343, 345 (2d Cir. 1995); *Ahng* v. *Allsteel, Inc.*, 96 F.3d 1033, 1037 (7th Cir. 1996); whether the parties in the later litigation had manifested consent to be bound by the earlier case, see, *e.g.*, *Benson & Ford, Inc.* v. *Wanda Petroleum Co.*, 833 F.2d 1172, 1176 (5th Cir. 1987); and whether the parties in the later case had timely notice of the earlier one, see, *e.g.*, *Gonzalez*, 27 F.3d at 761 & n.10. No court has accepted the proposition that mere representation by a common counsel and assertion of a similar legal claim is sufficient to trigger claim preclusion against a nonparty. See, *e.g.*, *Gonzalez*, 27 F.3d at 759. Accordingly, the State's suggestion that the four new appellants were barred by res judicata principles should be rejected.

CONCLUSION

The Court should reverse the district court's grant of summary judgment to appellees.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General
WILLIAM R. YEOMANS
Acting Assistant Attorney General
BARBARA D. UNDERWOOD
Deputy Solicitor General
JAMES A. FELDMAN
Assistant to the Solicitor General
DAVID K. FLYNN
LOUIS E. PERAERTZ
Attorneys

NOVEMBER 1998

(6)

No. 98-85

FILED
NOV 10 1998
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

JAMES B. HUNT, JR., in his official capacity as Governor of the State of North Carolina, *et al.*,

Appellants,

v.

MARTIN CROMARTIE, *et al.*,

Appellees.

On Appeal from the United States District Court for the Eastern District of North Carolina

---

BRIEF *AMICI CURIAE* OF CONGRESSWOMAN CORRINE BROWN, CONGRESSMAN JOHN LEWIS, CONGRESSWOMAN CYNTHIA McKINNEY, AND THE DEMOCRATIC CONGRESIONAL CAMPAIGN COMMITTEE SUPPORTING APPELLANTS

J. GERALD HEBERT
800 Parkway Terrace
Alexandria, VA 22302
(703) 684-3585

PAUL M. SMITH*
DONALD B. VERRILLI, JR.
HEATHER K. GERKEN
JENNER & BLOCK
601 Thirteenth Street, N.W.
Washington, D.C. 20005
(202) 639-6000

*Counsel of Record

November 10, 1998

34 pp

TABLE OF CONTENTS

Page

INTEREST OF AMICI 1

SUMMARY OF ARGUMENT 2

ARGUMENT 5

I. TWO UNDISPUTED CHARACTERISTICS OF DISTRICT 12 SHOULD CREATE A STRONG PRESUMPTION AGAINST A FINDING OF A RACIAL GERRYMANDER ... 6

A. A State's Decision to Draw a District Creating a Reasonable Opportunity for the Formation of Successful Interracial Coalitions Is Not Generally Problematic Under the Equal Protection Clause 6

B. A State's Use of Precincts or Census Tracts as the Foundation for its Redistricting Plan Further Strengthens the Presumption of Constitutionality 12

C. The Court Should Explicitly Adopt a Presumption of Constitutionality in Favor of Districts Like District 12 18

II. THE FACTS ON WHICH THE DISTRICT COURT RELIED DO NOT COME CLOSE TO JUSTIFYING ITS FINDING OF LIABILITY 19

CONCLUSION 29

TABLE OF AUTHORITIES

CASES **PAGE**

Abrams v. Johnson, 117 S. Ct. 1925 (1997) 23
Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986) 20
Bush v. Vera, 517 U.S. 952 (1996) ..... *passim*
Connor v. Finch, 431 U.S. 407 (1977) 24
Davis v. Bandemer, 478 U.S. 109 (1986) . 10, 19, 27
DeWitt v. Wilson, 515 U.S. 1170 (1995), *summarily aff'g* 856 F. Supp. 1409 (E.D. Cal. 1994) 3, 7
DeWitt v. Wilson, 856 F. Supp. 1409 (E.D. Cal. 1994), *summarily aff'd*, 515 U.S. 1170 (1995) 10, 16, 17, 21
Johnson v. DeGrandy, 512 U.S. 997 (1994) .. 2, 3, 9
Johnson v. Miller, 864 F. Supp. 1354 (S.D. Ga. 1994), *aff'd*, 515 U.S. 900 (1995) 13
Lawyer v. Department of Justice, 117 S. Ct. 2186 (1997) ..... *passim*
Legislature v. Reinecke, 516 P.2d 6 (Cal. 1973) .. 17
Meadows v. Moon, 117 S. Ct. 2501, *summarily aff'g* 952 F. Supp. 1141 (E.D. Va. 1997) .. 7, 14
Miller v. Johnson, 515 U.S. 900 (1995) .... *passim*
Quilter v. Voinovich, 118 S. Ct. 1358 (1998), *summarily aff'g* 981 F. Supp. 1032 (N.D. Ohio 1997) 3, 7
Shaw v. Hunt, 861 F. Supp. 408 (E.D.N.C. 1994), *rev'd*, 517 U.S. 899 (1996) 13
Shaw v. Hunt, 517 U.S. 899 (1996) 6, 7, 9, 13
Shaw v. Reno, 509 U.S. 630 (1993) ..... *passim*
Silver v. Diaz, 118 S. Ct. 36 (1997), *summarily aff'g* 978 F. Supp. 96 (E.D.N.Y. 1997) 7, 13

PAGE

Thornburg v. Gingles, 478 U.S. 30 (1986) ... 10, 11
United States v. Hays, 515 U.S. 737 (1995) 6, 8
Uno v. City of Holyoke, 72 F.3d 973 (1st Cir. 1995) 10
Upham v. Seamon, 456 U.S. 37 (1982) 23
Voinovich v. Quilter, 507 U.S. 146 (1993) ... 23, 27
Whitcomb v. Chavis, 403 U.S. 124 (1971) 23
White v. Weiser, 412 U.S. 783 (1973) 23
Wilson v. Eu, 823 P.2d 545 (Cal. 1992) 14, 15, 16, 17, 21
Wise v. Lipscomb, 437 U.S. 535 (1978) 23

STATUTES

Section 2 of the Voting Rights Act, 42 U.S.C. § 1973 8

MISCELLANEOUS

Michael Barone & Grant Ujifusa, *The Almanac of American Politics 1998* (1997) 26
Bureau of the Census, U.S. Department of Commerce, Guidelines for Delineating Census Tracts and Block Groups (June 1985) 14
Samuel Issacharoff, *Polarized Voting and the Political Process: The Transformation of Voting Rights Jurisprudence*, 90 Mich. L. Rev. 1833 (1992) 11
Richard H. Pildes & Richard G. Niemi, *Expressive Harms, "Bizarre Districts," and Voting Rights: Evaluating Election-District Appearances After* Shaw v. Reno, 92 Mich. L. Rev. 483 (1993) 8, 9, 13, 17

PAGE

Richard H. Pildes, *Principled Limitations on Racial and Partisan Redistricting*, 106 Yale L.J. 2505 (1997) 16, 19

The World Almanac and Book of Facts 1998 (1997) 24

http://www.sboe.state.nc.us/results9/ushouse.htm (visited Nov. 4, 1998) 21

http://www/ncga.state.nc.us/.html1997/geography/html3.2/main.html/ (visited Nov. 4, 1998) . 22, 25

http://www/ncga.state.nc.us/.html1998/geography/html3.2/main.html/ (visited Nov. 4, 1998) . 22, 25

INTEREST OF AMICI

Congresswoman Corrine Brown, Congressman John Lewis, and Congresswoman Cynthia McKinney represent congressional districts in states in which a districting plan has been challenged under *Shaw v. Reno*. The Democratic Congressional Campaign Committee is the political organization for Democratic Members of the United States House of Representatives and is responsible for assisting Democratic candidates running for election to the House.[1]

While the interests of the congressional representatives from North Carolina are being fully represented by appellants, *amici* also have a direct interest in the standards that may be established in this case to guide the future creation of congressional districts. Although *amici* certainly do not agree with all that this Court has said in the *Shaw* line of cases, they file this brief not in order to carry on that dispute, but because this case provides an opportunity for the Court, consistent with *Shaw*, to clarify the applicable law in advance of the next round of redistricting and the onslaught of legal challenges that will surely follow. This brief offers a workable framework for dealing with racial gerrymandering claims like the one before this Court. It offers a simple test for determining whether a challenged district is presumptively constitutional. Although the presumption proposed in this brief is implicit in this Court's prior decisions, *amici* respectfully urge this Court to recognize it expressly in order to provide much-needed guidance to states and courts as they gear up for the redistricting that will take place after the 2000 Census.

---

[1] Counsel for *amici* authored the entire brief, and no party other than *amici* has made a monetary contribution to the preparation or submission of the brief. Letters of consent to the filing of this brief by all parties have been filed with the Clerk.

SUMMARY OF ARGUMENT

1. *Shaw v. Reno*, 509 U.S. 630 (1993), addressed certain types of "expressive" and "representational" harms thought to arise from the deliberate creation of majority-minority districts. Two undisputed features of North Carolina's District 12, as drawn by the state legislature in 1997, present virtually insuperable barriers to those who would label the district as a continued example of "racial gerrymandering" proscribed in *Shaw*: (1) the supposedly favored racial group does not have a controlling electoral majority, and (2) the district lines were drawn using precincts -- a geographic unit that, like census tracts but in contrast to much smaller census blocks, promotes compactness and allows for reliance on nonracial data.

To begin, even assuming that the North Carolina General Assembly deliberately made some effort to group together a substantial number of African-Americans in District 12, it stopped short of providing them a controlling electoral majority, creating instead a district where African-Americans must "pull, haul, and trade" in order to elect their candidate of choice. *Johnson v. DeGrandy*, 512 U.S. 997, 1020 (1994). That is significant because such a district rarely, if ever, implicates the harms *Shaw* addresses. It does not, as the Court found to be the case with certain deliberately created majority-minority districts, "convey the message that political identity is, or should be, predominantly racial." *Bush v. Vera*, 517 U.S. 952, 980 (1996) (plurality opinion). Nor does it suggest to elected representatives "that their primary obligation is to represent only the members of [the allegedly favored racial minority], rather than their constituency as a whole." *Shaw v Reno*, 509 U.S. at 648.

Indeed, such districts are more likely to signal political integration than racial division. They confirm "the fact that there are communities in which minority citizens are able to form coalitions with voters from other racial and ethnic groups." *DeGrandy*, 512 U.S. at 1020; *see also Lawyer v. Department of Justice*, 117 S. Ct. 2186, 2195 (1997) (such a district "'offers to any candidate, without regard to race, the opportunity' to seek and be elected to office") (citation omitted). Moreover, without conveying any of the messages that troubled the Court in *Shaw*, the creation of such districts does much to facilitate meaningful interracial coalition building. That is presumably why the Court has consistently declined to invalidate majority-white districts drawn to include a substantial minority population. *See, e.g., Lawyer*, 117 S. Ct. at 2195 (upholding district with 36% minority population); *Quilter v. Voinovich*, 118 S. Ct. 1358 (1998), *summarily aff'g* 981 F. Supp. 1032 (N.D. Ohio 1997) (three-judge court) (declining to apply strict scrutiny to four districts where minority voters did not constitute a majority); *DeWitt v. Wilson*, 515 U.S. 1170 (1995), *summarily aff'g* 856 F. Supp. 1409 (E.D. Cal. 1994) (three-judge court) (declining to apply strict scrutiny to California's 52 congressional districts, 17 of which were majority-white districts containing a minority population that exceeded 35%).

2. There is even less cause for constitutional concern where, as here, a district is drawn using sensible, organic geographic units like precincts or census tracts. Use of such geographic units mitigates the concerns raised by reliance on smaller units like census blocks, for which only racial data is available. *See Bush*, 517 U.S. at 961-64, 966-67, 972-76 (plurality opinion). Census tracts and precincts allow redistricters to use appropriate information in drawing lines, help ensure that voters are grouped sensibly, tend to promote

compactness, and are large enough to prevent the extraordinarily detailed race-based line-drawing that can occur when census blocks are used as the foundation for a districting plan. Thus, use of such geographic units guards against the appearance that race has been employed for its own sake or as a proxy for political behavior. These facts strongly support this Court's pattern of rejecting constitutional challenges to districts drawn using whole census tracts while invalidating some challenged districts drawn at the census-block level. Accordingly, *amici* urge this Court to recognize a strong presumption of constitutionality where, as here, a state has used appropriate geographic units to create a district in which the supposedly favored group does not enjoy a controlling electoral majority, but must instead work with other racial groups to pursue shared goals.

3. Only the most egregious example of race-based line-drawing could overcome such a presumption. The facts of this case do not come close to satisfying that standard. To the contrary, the bulk of the departures from traditional districting practices identified by the three-judge court -- the elongated shape of the district, the splitting of counties, etc. -- stemmed primarily from the difficulties inherent in creating a Democratic-leaning district in the Piedmont region of North Carolina. That fact is confirmed by the plan ultimately approved by the three-judge court. District 12 in the 1998 court-ordered plan retains all of these basic features, and any "improvements" over the 1997 legislative plan came at the expense of substantially *weakening* Democratic voting strength. As to the remaining examples of race-based line-drawing identified by the District Court, they reveal only that the court substituted its own intuitions about redistricting for the politically informed judgments of the General Assembly and premised *Shaw* liability

upon its quarrel with a handful of the State's line-drawing decisions. The Court should, accordingly, reverse.

ARGUMENT

This case presents an excellent opportunity to provide needed guidance to states and courts about the proper application of *Shaw v. Reno* and its progeny in the upcoming round of redistricting following the 2000 Census. In many significant respects, the North Carolina legislature in 1997 faced a task that mirrors the problems that will confront other states in 2001. In redrawing its congressional district lines, the State chose to try to maintain the existing partisan balance and seniority of its congressional delegation by preserving the geographic cores of all existing districts. Thus, in creating the new District 12, the legislature endeavored to eliminate features that this Court had found to reflect excessive reliance on race, while retaining a district that was predominantly Democratic and offered the incumbent congressman the same opportunity for reelection being granted to all other incumbents around the State. In determining whether the State achieved its goals in a constitutional fashion, the Court can give great assistance to other states that will inevitably face similar quandaries two years down the road. For the reasons stated here, *amici* believe that this case provides an illustration of how states can avoid violating *Shaw* even as they continue to make legitimate efforts to create districts in which minority voters have an equal opportunity to participate in the political process and to elect candidates of their choice.

I. TWO UNDISPUTED CHARACTERISTICS OF DISTRICT 12 SHOULD CREATE A STRONG PRESUMPTION AGAINST A FINDING OF A RACIAL GERRYMANDER.

A. A State's Decision to Draw a District Creating a Reasonable Opportunity for the Formation of Successful Interracial Coalitions Is Not Generally Problematic Under the Equal Protection Clause.

Shaw v. Reno addressed certain types of "expressive" and "representational" harms that this Court held can arise from the deliberate creation of majority-minority districts. *See United States v. Hays*, 515 U.S. 737, 744-45 (1995); *see also Bush*, 517 U.S. at 980-81, 984 (plurality opinion); *Shaw v. Hunt*, 517 U.S. 899, 926-27 (1996). It thus requires the application of strict scrutiny only where race has "predominated" -- that is, where "the legislature subordinated traditional race-neutral districting principles . . . to racial considerations." *Miller v. Johnson*, 515 U.S. 900, 916 (1995). *Shaw* has been limited in this fashion based on the Court's recognition that it is entirely legitimate to give some weight to racial considerations in drawing districts, including majority-minority districts. *See Bush*, 517 U.S. at 958 (plurality opinion) (strict scrutiny does not "apply to all cases of intentional creation of majority-minority districts"); *id.* at 995 (O'Connor, J., concurring) (*Shaw* is aimed at "distinguishing the appropriate and reasonably necessary uses of race from its unjustified and excessive uses"); *Miller*, 515 U.S. at 928-29 (O'Connor, J., concurring) (*Shaw* applies only to "extreme instances" of gerrymandering).

This case involves allegations that the State made deliberate efforts to group together African-Americans in District 12. The fact that their voting share nevertheless fell short of a majority

should be given substantial weight in the "predominance" inquiry under *Shaw* and *Miller*. Until now, the Court has applied strict scrutiny only to certain deliberately created majority-minority districts. It has consistently declined to invalidate districts where the minority population constituted less than 50% of the population.[2] Moreover, just last Term the Court observed that "[t]he fact that [a challenged district] is not a majority-black district . . . . supports" a decision not to subject the district to strict scrutiny. *Lawyer*, 117 S. Ct. at 2195.

The distinction implicitly drawn by the Court provides a potentially useful basis for limiting and clarifying the scope of the *Shaw* doctrine. Districts like District 12 -- where African-American voters are grouped together to the point where they have substantial electoral power but not unilateral electoral control -- rarely, if ever, cause representational or expressive

---

[2] *Compare Shaw v. Hunt*, 517 U.S. at 905-06 (invalidating districting plan whose "'overriding purpose'" was the creation of a district with an African-American voting majority) (citation omitted), *Bush*, 517 U.S. at 972-73 (plurality opinion) (invalidating "exceptional" majority-minority district whose "shape was essentially dictated by racial considerations"), *Miller*, 515 U.S. at 918 (invalidating majority-minority district when it was "'undisputed that [the district] is the product of a desire by the General Assembly to create a majority black district'") (citations omitted), *Silver v. Diaz*, 118 S. Ct. 36 (1997), *summarily aff'g* 978 F. Supp. 96 (E.D.N.Y. 1997) (three-judge court) (invalidating majority-minority district), *and Meadows v. Moon*, 117 S. Ct. 2501 (1997), *summarily aff'g* 952 F. Supp. 1141 (E.D. Va. 1997) (three-judge court) (invalidating majority-minority district), *with Lawyer*, 117 S. Ct. at 2195 (upholding district in part because it was not a majority-minority district), *Quilter v. Voinovich*, 118 S. Ct. 1358 (1998), *summarily aff'g* 981 F. Supp. 1032 (N.D. Ohio 1997) (three-judge court) (declining to apply strict scrutiny to four districts where minority voters did not constitute a majority), *and DeWitt v. Wilson*, 515 U.S. 1170 (1995), *summarily aff'g* 856 F. Supp. 1409 (E.D. Cal. 1994) (three-judge court) (declining to apply strict scrutiny to California's 52 congressional districts, 17 of which were majority-white districts containing a minority population that exceeded 35%).

harms.[3] Almost by definition such a district cannot impose representational harms on non-African-Americans because African-Americans do not constitute a majority by any measure. It is therefore unlikely that its elected officials will "believe that their primary obligation is to represent only the members of [the minority] group, rather than their constituency as a whole." *Shaw v. Reno*, 509 U.S. at 648; *see also Hays*, 515 U.S. at 744.

Similarly, such districts rarely, if ever, result in expressive harms because they do not "convey the message that political identity is, or should be, predominantly racial." *Bush*, 517 U.S. at 980 (plurality opinion); *see* Richard H. Pildes & Richard G. Niemi, *Expressive Harms, "Bizarre Districts," and Voting Rights: Evaluating Election-District Appearances After* Shaw v. Reno, 92 Mich. L. Rev. 483, 506-16 (1993). This is not a case where the General Assembly "foreordain[ed] that one race be the majority." *Bush*, 517 U.S. at 996 (Kennedy, J., concurring). Indeed, the fact that the allegedly favored group does not enjoy a controlling electoral majority distinguishes this case from those in which this Court concluded that unilateral control by the favored race was a criterion that "could not be compromised." *Shaw v. Hunt*, 517 U.S. at 907.

[3] *Amici* do not wish to discourage the creation of majority-minority districts or suggest that they should generally be treated differently from majority-white districts. *See Miller*, 515 U.S. at 928 (O'Connor, J., concurring) (noting that *Shaw* does not impose a racial double standard); *Bush*, 517 U.S. at 996 (Kennedy, J., concurring) (same). To the contrary, as we noted at the outset, *supra* p. 6, most majority-minority districts are not themselves properly subjected to strict scrutiny, and this Court certainly should not establish any standard that would deter creation of the kind of reasonably compact majority-minority districts often required by Section 2 of the Voting Rights Act, 42 U.S.C. § 1973.

Moreover, *amici*'s proposal to accord somewhat different treatment to more extreme efforts to group together minority voters -- based on whether or not those efforts produce a majority-minority district -- merely reflects the inherent logic of the *Shaw* lines of cases. In keeping with the Court's view that "reapportionment is one area in which appearances do matter," *Shaw v. Reno*, 509 U.S. at 647, *amici* simply urge this Court to recognize that the message sent by the 1997 legislative plan is different from the one this Court found to be conveyed by the plan invalidated in *Shaw v. Hunt*.

Finally, the distinctions *amici* urge this Court to acknowledge should, of course, apply equally when states make deliberate efforts to group together *whites*. Thus, a bizarrely shaped majority-white district carved out of an area where one would expect, *ceteris paribus*, to find a majority-minority district would *not* be entitled to the presumption outlined in this brief. It would instead be subject to the same level of scrutiny that the Court has applied to a bizarrely shaped majority-minority districts drawn from majority-white areas.

Even when districts like District 12 are purposefully created to augment minority voting power, their creation is necessarily premised on the assumption that "minority citizens are able to form coalitions with voters from other racial and ethnic groups." *DeGrandy*, 512 U.S. at 1020.[4] They thus convey the message that members of all races will "pull, haul, and trade to find common political ground, the virtue of which is not to be slighted" for those who hope to "hasten the waning of racism in American politics." *Id.* These districts also "'offer to any candidate, without regard to race, the opportunity' to seek and be elected to office," *Lawyer*, 117 S. Ct. at 2195 (citations omitted), and signal legislative trust that the candidate elected will adequately represent voters of all races. In short, districts like District 12 defy the very stereotypes *Shaw* sought to combat.

[4] *Amici*, to be sure, do not mean to suggest that interracial coalition building cannot occur in majority-minority districts. It clearly does occur. But when a state has carved a bizarrely shaped majority-minority district out of a predominantly white area, *Shaw* indicates that such a district sends a different message about the importance of race than either a compact majority-white district drawn in that area or a compact majority-black district drawn elsewhere.

Not only do these districts convey a message of racial cooperation, they also help make this worthwhile goal a reality by encouraging interracial coalition building. First, including a sizeable concentration of minority voters in the same district makes it easier for them to participate in the political system. It facilitates efforts to "recruit[] and nurture[]" candidates and makes "grassroots organizing and campaigning . . . more viable." *DeWitt*, 856 F. Supp. at 1414. Second, by ensuring that a minority group is large enough to wield political clout during an election, it creates incentives for elected officials and nonminorities to work with that group to achieve shared agendas. Meaningful cross-racial alliances are far less likely to arise if minority voters are scattered among several districts because they will not be a significant enough political force in any single district to engage in such coalition building. For these reasons, districts like District 12 are "to be prized as a means of encouraging both voters and candidates to dismantle the barriers that wall off racial groups and replace those barriers with voting coalitions." *Uno v. City of Holyoke*, 72 F.3d 973, 991 (1st Cir. 1995). They thus "bring us closer to 'the goal of a political system in which race no longer matters.'" *Id.* (quoting *Shaw v. Reno*, 509 U.S. at 657).[5]

---

[5] A state's interest in grouping together sizeable clusters of minority voters is most substantial where, as here, voting is strongly polarized. *See* Affidavit of Gary Bartlett, Vol. 4, Attachment 97C-28F-3B (Engstrom Report). The Court has long recognized that polarized voting can routinely defeat the preferences of minority voters at the polls. *See Thornburg v. Gingles*, 478 U.S. 30, 52-77 (1986); *Davis v. Bandemer*, 478 U.S. 109, 151 (1986) (O'Connor, J., concurring) ("As a matter of past history and present reality, there is a direct and immediate relationship between the racial minority's group voting strength in a particular community and the individual rights of its members to vote and to participate in the political process."). Depending on the level of racial polarization, minority groups that are too small to constitute a voting majority can nevertheless elect their candidate of choice with the help of white cross-over voting, *provided that they are large enough to do so. See Gingles*, 478

The concept of "coalition building," to be sure, may imply that groups, whether defined by race or by some other shared trait, perceive themselves as having a common interest and sometimes wish to work together to achieve a shared goal.[6] But even when a state deliberately sets out to draw such districts, the very premise of their creation is that the interests shared by minority voters do not override all others and are, indeed, shared by at least some white voters. *See* Samuel Issacharoff, *Polarized Voting and the Political Process: The Transformation of Voting Rights Jurisprudence*, 90 Mich. L. Rev. 1833, 1864 (1992) ("Ideally, politics should be a deliberative process in which cross-cutting alliances will be formed on an issue-by-issue basis and in which race will not serve as the overriding cue for voting behavior.") (footnote omitted). Thus, the means chosen by the State to promote integrated electoral politics goes far to ensure that the district in question does not signal "that political identity is, or should be, predominantly racial." *Bush*, 517 U.S. at 980 (plurality opinion). As this Court observed in *Lawyer*, "[t]he fact that [the challenged district] is not a majority black district . . . . *supports*" a decision not to subject it to strict scrutiny. *Lawyer*, 117 S. Ct. at 2195 (emphasis added); *see also id.* (Court has "never recognized similar racial composition of different

---

U.S. at 85-87 (O'Connor, J. concurring) (noting that the percentage of African-American voters needed to elect their candidate of choice depends on levels of polarization). Thus, even in cases where a minority group cannot form a reasonably compact majority and Section 2 of the Voting Rights Act may not apply as a formal matter, the equal-protection concerns that animate that statute surely would justify a state's efforts to assure that minority voters play a meaningful role in the democratic process.

[6] That view is amply confirmed by the record, which makes clear that African-Americans vote cohesively. Affidavit of Gary Bartlett, Vol. 4, Attachment 97C-28F-3B (Engstrom Report).

political districts as being necessary to avoid an inference of racial gerrymandering in any one of them").

In evaluating the State's compliance with the Equal Protection Clause, the Court should give considerable weight to the fact that districts like District 12 generally do not convey the type of message that concerned the Court in *Shaw*. As this Court has emphasized, "reapportionment is one area in which appearances do matter." *Shaw v. Reno*, 509 U.S. at 647. For this reason, only the most egregious departures from traditional districting practices could overcome the otherwise permissible message that such districts generally convey. They could properly be treated as "racial gerrymanders" only where a state's line-drawing decisions convey an unmistakable message that race was the only thing that mattered.

B. A State's Use of Precincts or Census Tracts as the Foundation for its Redistricting Plan Further Strengthens the Presumption of Constitutionality.

Any standard for evaluating a state's redistricting choices must reflect the realities of redistricting in the computer age. In drawing districts with the aid of computers, a state selects a geographic unit as the foundation for its redistricting plan — be it a census block, census tract, or precinct[7] — and gradually adds to the selected core, unit by unit, until the appropriate population level has been attained. A state's choice of a foundational unit can have a profound effect on the way voters are grouped and the resulting shape of the district. That fact is confirmed by the decision in *Bush*, where the Court roundly

[7] A census block is a much smaller geographic unit than either a precinct or a census tract. In North Carolina a typical precinct or census tract contains roughly 100 to 150 census blocks. *Infra* p. 16.

condemned the State's use of census blocks as the basic unit for redistricting. *See Bush*, 517 U.S. at 961-64, 966-67, 972-76 (plurality opinion).

The *Bush* Court identified two problems with census blocks, which are generally identical to city blocks and, on average, contain only a few dozen residents. First, at the census-block level, only total population and racial data are available to redistricters, thus leading the state to focus too heavily on race in drawing lines. *Id.* at 961-62 (availability of racial data at block level "enabled districters to make more intricate refinements on the basis of race than on the basis of other demographic information"). Second, these units are small and manipulable, thereby allowing for surgical line-drawing separating voters by race. Their use thus tends to result in extremely jagged district boundaries that convey the unmistakable message that race was the state's overriding redistricting concern. *Id.* at 973-76 (boundary lines that "interlock 'like a jigsaw puzzle'" and "correlate almost perfectly with race" are "'unexplainable on grounds other than racial quotas established for those districts'") (citations omitted). Perhaps for this reason, *every* district that this Court has invalidated under *Shaw* has been drawn using census blocks.[8]

[8] In addition to *Bush*, the Court struck down the original North Carolina District 12, where census blocks were used "as basic building blocks in the redistricting process." *Shaw v. Hunt*, 861 F. Supp. 408, 457 (E.D.N.C. 1994), *rev'd*, 517 U.S. 899 (1996) (striking down District 12). Similarly, in *Miller* the Court invalidated a district where the legislature split precincts in order to include African-American voters in the challenged districts and engaged in a "block by block search for black voters to add to the [district]." *Johnson v. Miller*, 864 F. Supp. 1354, 1377-78 (S.D. Ga. 1994), *aff'd*, 515 U.S. 900 (1995). *See also Silver v. Diaz*, 118 S. Ct. 36 (1997), *summarily aff'g* 978 F. Supp. 96, 110-11, 118 (E.D.N.Y. 1997) (three-judge court) (invalidating district that was at points "one-block long," and "curve[d] and

Two other units commonly used by states in redistricting -- precincts and census tracts -- go far to alleviate the concerns raised by this Court regarding the use of census blocks because they provide larger, organic units with which to construct a district. To begin with, the use of precincts and census tracts helps ensure that the state is sensibly grouping voters instead of dividing them by race. Precincts follow local political boundaries, and census tracts are neatly nested within political subdivisions. *See* Bureau of the Census, U.S. Department of Commerce, Guidelines for Delineating Census Tracts and Block Groups 5 (June 1985) [hereinafter "Census Tract Guidelines"] ("[t]he county line always is a census tract boundary"). Moreover, census tracts are drawn by the Census Bureau to represent socially homogenous populations, and their borders tend to be easily recognizable natural or man-made features. *See* Census Tract Guidelines at 5 ("Census tract boundaries follow permanent, visible features, such as streets, roads, highways, rivers, canals, railroads, high-tension power lines, and so forth."); *id.* at 10 ("census tracts should comprise, as far as practicable, a population having similar socioeconomic and housing characteristics"); *see also Wilson v. Eu*, 823 P.2d 545, 552 (Cal. 1992) (approving use of census tracts to draw district lines because they are "'homogenous as to social characteristics,' and are bounded by 'prominent natural or manmade geographical features'") (citations omitted). In essence, census tracts are what we colloquially refer to as

---

weave[d] among street blocks" to pick up minority voters); *Meadows v. Moon*, 117 S. Ct. 2501 (1997), *summarily aff'g* 952 F. Supp. 1141, 1147 (E.D. Va. 1997) (three-judge court) (invalidating district drawn "based upon race at the census block level to divide precincts and apportion large numbers of voters based on race into, and out of, the [challenged district]"). By contrast, the Court has affirmed a district court decision declining to apply strict scrutiny to districts designed to augment minority electoral strength when the districts were drawn using whole, undivided census tracts. *Infra* pp. 16-17.

"neighborhoods," or what *Miller* described as "communities [of interest] defined by actual shared interests," 515 U.S. at 916. *See Wilson*, 832 P.2d at 552 (keeping intact census tracts preserves communities of interest). Districts constructed using precincts or census tracts, then, are unlikely to convey an impermissible message to voters wondering why they fall on one side of the district line or the other.

Moreover, appropriate, nonracial information is available for each precinct and census tract, thus making it less likely that an impermissible message will be conveyed. Precincts allow a redistricter to construct a district using election data, which are legitimately considered in any line-drawing decision. *See Bush*, 517 U.S. at 964-65 (plurality opinion). Even more information is available to the redistricter at the census-tract level, including detailed socioeconomic and demographic information. *See Lawyer*, 117 S. Ct. at 2195 (approving district that was drawn along socioeconomic lines).[9] Both thus help ensure that race is not seen as a "proxy" for voter behavior, as occurs when a state redistricts using census blocks for which only racial information is available. *See Bush*, 517 U.S. at 961-62 (plurality opinion) (contrasting use of the "uniquely detailed racial data" available at census-block level with the broad range of "party registration and past voting statistics" and "demographic information" available at the precinct or census-tract level).

Furthermore, precincts and census tracts are substantially larger than census blocks, which have served as the basis for drawing each of the majority-minority districts struck down by this Court. *See supra* note 8. According to figures provided by

---

[9] Even when precincts do not correspond exactly with census-tract lines, a redistricting program can aggregate precinct-level election results for each census tract so that voting data is available at the tract level.

the Geography Division of the Census Bureau, there are approximately 220,000 census blocks in North Carolina. By contrast, there are only about 1,500 census tracts and 2,200 precincts in North Carolina. *Compare Wilson*, 823 P.2d at 571 (California contains 400,000 census blocks but only 6,000 census tracts). Reliance on census tracts and precincts effectively forecloses the degree of racial fine-tuning that the Court condemned in *Bush*, 517 U.S. at 961-64, 972-76 (plurality opinion), and helps ensure that congressional districts are not dramatically irregular, *see id.* at 972-76 (plurality opinion) (concluding that jagged boundaries signal predominance of race). *See also* Richard H. Pildes, *Principled Limitations on Racial and Partisan Redistricting*, 106 Yale L.J. 2505, 2516 (1997) (attributing significant increase in bizarrely shaped districts in 1990s to "technological improve[ments]" that allowed for more fine-tuned line-drawing).

The use of undivided census tracts, in particular, goes far to guarantee that districts will be reasonably compact and will not contain the type of jagged edges that signal egregious race-based line-drawing.[10] That fact is confirmed by the decision of the three-judge court in *DeWitt v. Wilson*, 856 F. Supp. 1409 (E.D. Cal. 1994), summarily affirmed by this Court, 515 U.S. 1170 (1995). Using whole census tracts to draw district lines, *see DeWitt*, 856 F. Supp. at 1413-15; *Wilson*, 823 P.2d at 549-50, redistricters drew 17 districts containing a minority population that was greater than 35% but less than 50%.[11]

---

[10] Of course, where, as here, the state is forced in the middle of a decade to draw districts on an expedited basis and wishes to do so largely along partisan lines, using precincts is the most administratively efficient means to do so.

[11] *See Wilson*, 823 P.2d at 568 (text of Special Masters' Report) ("we have aimed to maximize the voting potential of a geographically compact minority group of any appreciable size even where it would not constitute a majority in the particular district"); *id.* at 598 (providing racial breakdown of congressional districts).

Even though the State's deliberate efforts to group together minority voters resulted in the creation of some "elongated districts," *Wilson*, 823 P.2d at 579-80 (text of report by Special Masters), the districts' "perimeter scores" -- one measure of compactness -- were quite high. *See Expressive Harms*, 92 Mich. L. Rev. at 549 (perimeter score is low if "district's borders wander around in contorted way"); *id.* at 565 (listing districts with lowest perimeter scores).[12] Moreover, as noted by the California Supreme Court, districting using census tracts "'aid[s] in establishing natural, well defined legislative districts and . . . in obtaining valid pertinent socioeconomic data about such districts.'" *Legislature v. Reinecke*, 516 P.2d 6, 17 (Cal. 1973) (quoted by Special Masters in *Wilson*, 823 P.2d at 570). Under these circumstances, as a plurality of this Court has explicitly recognized, *see Bush*, 517 U.S. at 958, the district court was correct to decline to subject the challenged districting plan to strict scrutiny. *See DeWitt*, 856 F. Supp. at 1413-15.

For these reasons, the kind of showing necessary to trigger strict scrutiny for a district designed to foster interracial coalition building would be virtually impossible where, as here, the lines were based on existing precincts or census tracts, rather than smaller units like census blocks. The use of appropriate geographic units such as precincts or census tracts virtually guarantees that the resulting district will *not* signal that race was the overriding factor in a state's redistricting calculus. Districts that foster interracial coalition building and are

---

[12] Indeed, the only California district to be classified among the Nation's least compact districts received a low perimeter score due to topography, not gerrymandering. *See Expressive Harms*, 92 Mich. L. Rev. at 565-66 & n.234.

constructed from either of these two geographic units, then, should be deemed presumptively constitutional.

C. The Court Should Explicitly Adopt a Presumption of Constitutionality in Favor of Districts Like District 12.

Amici urge the Court to announce a very strong presumption of constitutionality in favor of districts where it is undisputed that the supposedly favored racial group does not have a controlling electoral majority and the state has redistricted using sensible, organic geographic units like precincts or census tracts. While such a presumption is certainly implicit within the Court's prior decisions and, indeed, mandated by the principles of *Shaw*, one cannot underestimate the importance of expressly providing this type of clear guideline to states and courts facing the next round of redistricting after the 2000 Census. Without a clear legal presumption designating those instances in which the use of race is permissible and those in which a state relies on race too heavily, it is possible that, as here, *Shaw* will be read to require the application of strict scrutiny to districts throughout the country, regardless of their racial make-up. *But see Miller*, 515 U.S. at 928-29 (O'Connor, J. concurring) ("Application of the Court's standard does not throw into doubt the vast majority of the Nation's 435 congressional districts. . . . That is so even though race may well have been considered in the redistricting process."). States facing the same redistricting challenges as North Carolina will be forced to redistrict without having any confidence that the federal district court reviewing their plan will not make the same mistakes made in this case.

Even if the Court were ultimately able to correct all of the mistaken district court decisions like this one, the Court's

failure to provide such a presumption today would inevitably distort the redistricting process. Indeed, because redistricting "cases are exceptionally charged politically, racially, and ethnically," *Principled Limitations*, 106 Yale L.J. at 2550, doctrinal ambiguities create an incentive for parties to seek through the courts what they could not obtain at the bargaining table, and thus will skew the bargaining process itself. *Id.; see also Davis v. Bandemer*, 478 U.S. 109, 147 (1986) (O'Connor, J., concurring in judgment) (rebuking plurality for inviting "the losing party or the losing group of legislators . . . to fight the battle anew in federal court"). For these reasons, this case provides an ideal opportunity to provide a workable framework for future efforts to ensure that minority voters have an equal opportunity to participate in the political process and to elect candidates of their choice.

II. THE FACTS ON WHICH THE DISTRICT COURT RELIED DO NOT COME CLOSE TO JUSTIFYING ITS FINDING OF LIABILITY.

Applying the presumption articulated above, the District Court plainly erred in summarily concluding that District 12 violated *Shaw*. Where, as here, a state has merely created a district in which all racial groups can engage in productive coalition building and has done so using appropriate geographic units, only the most egregious departures from traditional districting practices would signal that race was its overriding concern. Here the District Court did find that the State had drawn District 12 along racial lines. But the District Court did not – and could not – conclude that the State segregated voters on a block-by-block basis, failed to use appropriate geographic units in creating the district, or engaged in some other sort of

egregious racial line-drawing.[13] That is because the State consistently employed whole, undivided precincts in constructing District 12,[14] and the district's boundary betrays none of the racial fine-tuning evident in other *Shaw* cases.

Instead, the District Court rested its finding of liability on the shape of the district, the splitting of political subdivisions, and the State's exclusion of certain supposedly "heavily Democratic" precincts. But even assuming that the State deliberately drew District 12 to facilitate racial coalition-building, these facts would not begin to show that the State's consideration of race was so excessive that the three-judge court was justified in summarily invalidating the district. To the contrary, it remains clear that the predominant factor underlying the creation of District 12 was politics, not race.

The District Court's conclusion that race predominated in the drawing of District 12 was based in large part on the district's elongated shape and the fact that it split a number of

---

[13] The State presented direct evidence that the General Assembly was predominantly motivated by partisan concerns. J.S. App. at 69a-78a (Affidavit of Senator Roy A. Cooper, III); *id.* at 79a-84a (Affidavit of Representative W. Edwin McMahan). It also submitted an expert report confirming that partisan concerns, not race, best explain the inclusion and exclusion of precincts around the district's border. J.S. App. at 85a, 87a-88a, 98a-99a (Affidavit of Dr. David Peterson). The District Court's disregard of this evidence plainly contravened the requirements of Rule 56 of the Federal Rules of Civil Procedure. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-52 (1986); *see also Miller*, 515 U.S. at 915 ("until a claimant makes a showing sufficient to support [his or her] allegation, *the good faith of a state legislature must be presumed*") (emphasis added).

[14] Of the scores of precincts in and around District 12, the district split only one. The 1997 plan as a whole split only two of North Carolina's approximately 2200 precincts.

cities and counties. But because districts like District 12 convey a message of racial cooperation, not division, even an express decision to create such an elongated district could not, without more, signal that race was the "overriding factor" in the State's redistricting calculus. *See Wilson*, 823 P.2d at 579-80 (text of Special Masters' Report) (acknowledging that "elongated" districts in plan resulted from redistricters' efforts to augment minority voting strength); *DeWitt*, 856 F. Supp. at 1415 (declining to apply strict scrutiny to districting plan drawn by Special Masters in *Wilson*).

It would be especially inappropriate to infer illicit intent from the district's shape here because that shape was dictated by the State's efforts to create a district in which the Democratic incumbent could be reelected. Indeed, *any* Democratic-leaning district in this part of North Carolina would, by necessity, resemble District 12 because Democrats in that area are clustered in medium-sized cities, with fairly sparse, Republican-dominated populations between them. For example, it was not possible to draw a Democratic district that includes all of Charlotte and Mecklenburg County, nor was it possible to do so entirely in Guilford and Forsyth Counties.[15] Thus, the only sensible way to draw a Democratic-leaning

---

[15] The General Assembly could not draw a Democratic district located entirely in Guilford and Forsyth Counties because, according to 1996 U.S. House election results, those counties have voted heavily for Republicans in congressional elections. *See* http://www.sboe.state.nc.us/results9/ushouse.htm (visited Nov. 4, 1998) (official website of the North Carolina State Board of Elections) (county-by-county vote totals for each congressional race). Similarly, it could not draw a Democratic district that included all of Mecklenburg County (and thus all of Charlotte) because such a district would have given Republicans a significant advantage, *see id.*, and would have pitted District 12's Democratic incumbent Mel Watt against his neighbor, District 9's Republican incumbent Sue Myrick, who represents more than two-thirds of Mecklenburg County.

district was to do exactly what the State did here: include the Democratic parts of both areas by drawing a district that stretched from Charlotte in the south to the Piedmont Triad (Greensboro, Winston-Salem, and High Point) in the north, taking care not to pick up too many Republicans between those two metropolitan areas. Such a district would have to extend a fair distance across the region, split a number of counties and cities, and be narrow at points -- all major elements of the District Court's decision to invalidate the 1997 legislative plan. *See* J.S. App. 19a-22a.

That fact is confirmed by the 1998 court-ordered plan ultimately approved by the District Court. Even in that plan, where the court found that race had *not* predominated, J.S. App. 175a, 178a-179a, the new District 12 is still elongated, remains narrow in several places, and splits only one fewer county. More importantly, these "improvements" were made to the 1997 legislative plan only at the expense of significantly *weakening* Democratic voting strength in the district, lowering the margin of victory for Democratic candidates by 14 percentage points when compared to the 1997 legislative plan. *See* http://www/ncga.state.nc.us/.html1997/geography/html3.2/main.html/ (visited Nov. 4, 1998) (official website of North Carolina General Assembly) [hereinafter "NCGA Website"] (providing district-by-district election results for 1997 legislative plan and 1998 court-ordered plan). Thus, the predominant reason for the shape of District 12 was political, not racial.[16]

---

[16] Plaintiffs offer a different justification for the District Court's conclusion, one that cannot be squared with the District Court's approval of the 1998 court-ordered plan. They argue that, regardless of the State's motives, any remedial plan that retains the "core" of a previously invalidated district necessarily carries the "taint" of the former violation and is therefore unconstitutional as the "'fruit of the poisonous tree.'" That is incorrect. Had a federal court instead of the state legislature drawn a remedial district, it would have been *required* to do precisely what plaintiffs argue that the State cannot: retain as much of the old plan as possible in remedying the constitutional violation. *See Upham v. Seamon*, 456 U.S. 37, 43 (1982) (per curiam) (court may make only those changes "*necessary* to cure [the] . . . defect" and is "not free . . . to disregard the political program of the [state legislature]"); *Whitcomb v. Chavis*, 403 U.S. 124, 160 (1971) (remedial plan may not "intrude upon the state policy any more than necessary"); *White v. Weiser*, 412 U.S. 783, 793-95 (1973) (court must choose remedial plan that most closely resembles state's preference so long as it remedies constitutional violation). Given that a federal court would be required to maintain the core of District 12 in fashioning a constitutional remedy, it is beyond cavil that the state legislature has a similar power. *See Wise v. Lipscomb*, 437 U.S. 535, 540 (1978) (a "State's freedom of choice to devise substitutes for an apportionment plan found unconstitutional, either as a whole or in part, should not be restricted beyond the clear commands of the Equal Protection Clause"); *see also Lawyer*, 117 S. Ct. at 2191-92, 2195 (approving legislative plan that retains core of prior unconstitutional district, including a substantial portion of minority voters); *Voinovich v. Quilter*, 507 U.S. 146, 156-57 (1993) ("Of course, the federal courts may not order the creation of majority-minority districts unless necessary to remedy a violation of federal law. *But that does not mean that the State's powers are similarly limited. Quite the opposite is true* . . . .") (emphasis added).

Nor does *Abrams* provide any support for plaintiffs. The Court did not question, let alone overrule, the well-established principle that a court must defer to legislative preferences in adopting a remedial plan. *See Abrams v. Johnson*, 117 S. Ct. 1925, 1933 (1997). Instead, it considered how to assess the legislative preference given the Department of Justice's interference with Georgia's redistricting judgments. *See id.* (distinguishing case from *Upham* because the plan purportedly expressing the legislative preference was enacted due to improper pressure from the Department of Justice). In the present case, there is absolutely no evidence of Justice Department interference. *See* J.S. App. 31a-33a.

More fundamentally, the District Court's heavy emphasis on the State's splitting of political subdivisions was wrong as a matter of principle. An illicit motive cannot be inferred from a state's decision to use precincts or census tracts rather than large subdivisions like counties and cities as the foundational

unit for drawing districts. That is because cities and counties are generally too large and heterogeneous to provide suitable "building blocks" for redistricting. Because of their size, they are routinely split simply to satisfy other districting criteria. For example, "[t]he policy of maintaining the inviolability of county lines . . . , if strictly adhered to, must inevitably collide with the basic equal protection standard of one person, one vote." *Connor v. Finch*, 431 U.S. 407, 419 (1977). Indeed, there are more than 80 counties in the United States that are too large to be placed in a single congressional district, and roughly 40% of the U.S. population resides in those counties. *See The World Almanac and Book of Facts 1998*, at 376, 420-38 (1997). Because state legislative districts are usually much smaller than federal ones, the splitting of counties and cities becomes even more inevitable in drawing the former.

Similarly, these types of political subdivisions often contain distinct communities of interest that are more sensibly grouped into separate districts -- for example, poor, urban residents may have little in common with wealthy suburbanites living in the same county. *See Lawyer*, 117 S. Ct. at 2195 (approving creation of district that split three counties where members "share a similarly depressed economic condition and interests that reflect it") (citations omitted). Finally, local officials often prefer to have their city or county divided among several congressional districts to "maximize" their points of access to Capitol Hill. Given the legitimate reasons a state like North Carolina has to selects precincts (or census tracts) instead of cities and counties as the foundation for its redistricting plan, it

was plainly inappropriate for the District Court to premise *Shaw* liability on the State's decision to make this reasonable choice.[17]

Finally, the District Court also inferred an illicit racial motive from the boundary of District 12 because the State excluded 32 predominantly white precincts that the court deemed to be "heavily Democratic" precincts based on *voter registration* data. The court erred for two reasons. First, of the 32 supposedly "heavily Democratic" precincts that the District Court claimed were wrongly excluded from District 12, J.S. App. 8a-9a, all but one were *less* Democratic -- even by the Court's incorrect measure -- than the district itself. *Compare* NCGA Website (indicating that the Democrats comprised 71.27% of registered voters in the 1997 version of District 12) *with* J.S. App. at 8a-9a (listing registration rates for 32 excluded precincts, 31 of which were less than 67% Democratic). Thus, their inclusion would have substantially *weakened* Democratic voting strength in District 12.

Second, as Judge Ervin sensibly explained in his dissent, registration data is a terribly misleading predictor of federal election results because "registered Democrats are not compelled to vote for Democratic candidates and often do not." J.S. App. 37a. Democratic registrants outnumber Republicans by more than two-to-one in North Carolina, yet Republicans have won most U.S. Senate elections there since 1970 and all but one Presidential race since 1964. Indeed, all twelve

---

[17] Nor is it clear that political subdivisions like cities and counties do much to aid the *Shaw* inquiry. Because these kinds of political subdivisions vary tremendously in geographic size and population density, it is very difficult to make comparative judgments about decisions to split them. *See Bush*, 517 U.S. at 963 (plurality opinion) (noting that line-drawing decisions create different appearances in "large, densely populated urban counties" than in rural areas).

congressional districts used in the 1998 elections would be designated "Democratic" by the District Court's faulty measure, *see* NCGA Website (listing district-by-district registration rates for 1998 plan), yet seven of those seats were captured by Republicans this fall. In short, the election returns on which the informed political actors who drew the challenged plan actually relied, *see* J.S. App. at 73a, not partisan registration rates, are plainly the appropriate measure for assessing Democratic strength in District 12.[18]

There were, to be sure, a handful of majority-Democrat precincts (measured by election results) left out of District 12. But that fact says nothing about whether partisan concerns primarily determined the shape of District 12. To the contrary,

---

[18] Appellees have tried to downplay the significance of the District Court's error by arguing that the 1990 race between former Mayor Gantt and Senator Helms is the only relevant race for gauging Democratic strength. *See* Appellees' Motion to Dismiss Or, in the Alternative, Affirm, at 25 (filed Aug. 26, 1998). But the state legislators who drew District 12 were plainly correct to rely on the results of other races as well. Indeed, while the Gantt-Helms numbers may provide an adequate basis for comparing the relative Democratic strength of precincts in the area, they are certainly not a good way to assess the likelihood that a Democrat will be elected in a congressional race. That is because Gantt, the former mayor of Charlotte and an extremely popular figure in the area, had a "home turf" advantage over Helms -- an advantage that would not be shared by a Democrat running in a congressional race, where *both* candidates would be from the area. The benefit of Gantt's regional ties is confirmed by the fact that Gantt performed *worse* than the average Democrat in nine of North Carolina's districts, but *better* than the average Democrat in the two districts where he had a home turf advantage: Districts 12 and 9. *See* NCGA Website (listing district-by-district election results for 1998 plan). It would be as problematic to call these precincts "Democratic" based on Gantt's performance as it would be to conclude that Arkansas is a wildly Democratic state in presidential elections just because then Governor Clinton beat President Bush there by 18 points. *See* Michael Barone & Grant Ujifusa, *The Almanac of American Politics 1998*, at 115 (1997).

it generally is in the Democrats' interest to leave out such precincts once a sufficiently "Democratic" district has been created. The addition of any other Democratic voters would result only in "packing," thereby wasting Democratic votes. *See Voinovich v. Quilter*, 507 U.S. 146, 153-54 (1993) (describing similar phenomenon for racial groups). Precisely the same incentives would have been at work for the GOP because moving any more "Democratic" precincts into District 12 would have resulted in "packing" more Republican voters in the surrounding districts (District 5, 6, 9, and 10).

In any case, it was surely inappropriate to invalidate North Carolina's preferred redistricting plan because the three-judge court disagreed as to the placement of a handful of the many precincts in District 12. The test for assessing the validity of the 1997 legislative plan is whether race was the *predominant* motive for a state's line-drawing decisions. *Miller*, 515 U.S. at 915-16. Liability cannot hinge upon the State's placement of a few precincts. *See Bandemer*, 478 U.S. at 133 (plurality opinion) ("[i]nviting attack on minor departures from some supposed norm would too much embroil the judiciary in second-guessing what has consistently been referred to as a political task for the legislature"); *id.* at 147 (O'Connor, J., concurring in the judgment) (concurring with this view out of concern that "[f]ederal courts will have no alternative but to attempt to recreate the complex process of legislative apportionment in the context of adversary litigation"). That is especially true where, as here, an examination of all of the relevant precincts *in toto* reveals a predominantly partisan rather than racial motive. *See* J.S. App. at 85a, 87a-88a, 98a-99a (Affidavit of Dr. David Peterson); *see also Bush*, 517 U.S. at 963-64 (plurality opinion) (holding that political considerations such as incumbency protection and preserving a partisan balance are traditional districting practices that can justify a misshapen district).

Indeed, if the constitutional validity of a district were to hinge upon this type of microanalysis, it would undermine the very principles announced in *Shaw*. Every time a redistricter included or excluded a precinct for any reason, the state would have to compare that precinct's racial make-up to those falling on the other side of the line. Worse, the state would be required to *alter* any race-neutral decision that violated whatever racial bottom-line a district court might demand. In short, a principle established to discourage the excessive consideration of race in redistricting would instead mandate it.

* * * *

Although the errors in the District Court's opinion are easily refuted, they signal the serious risks facing states during the next round of redistricting. In their efforts to enforce the Equal Protection Clause, federal district courts are all too likely to substitute their judgments regarding these complex questions for those of experienced political actors. States thus face the risk that, as in this case, *Shaw* liability will be premised on minor departures from standards the state chose not to use and could not hope to anticipate. The greatest assistance the Court could provide to states and courts alike is to articulate clear legal presumptions and standards regarding *Shaw*'s application to majority-white districts drawn to include a sizeable minority population. *See Bush*, 517 U.S. at 993 (O'Connor, J., concurring) (proposing "workable framework" for evaluating majority-minority districts). *Amici* submit that the presumption articulated here provides this type of workable framework. Accordingly *amici* strongly urge its explicit adoption.

CONCLUSION

The judgment below should be reversed.

Respectfully submitted,

J. GERALD HEBERT
800 Parkway Terrace
Alexandria, VA 22302
(703) 684-3585

PAUL M. SMITH*
DONALD B. VERRILLI, JR.
HEATHER K. GERKEN
JENNER & BLOCK
601 13th Street, N.W.
Washington, DC 20005
(202) 639-6000

November 10, 1998

* Counsel of Record

(8)

No. 98-85

FILED
NOV 9 - 1998
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The

Supreme Court of the United States

October Term, 1998

JAMES B. HUNT, JR., Governor of the State of North Carolina, et al.,

Appellants,

v.

MARTIN CROMARTIE, et al.,

Appellees.

On Appeal From The United States District Court For The Eastern District Of North Carolina

BRIEF AMICUS CURIAE OF AMERICAN CIVIL LIBERTIES UNION IN SUPPORT OF APPELLANTS

LAUGHLIN MCDONALD
Counsel of Record
NEIL BRADLEY
MAHA S. ZAKI
CRISTINA CORREIA
American Civil Liberties Union Foundation
44 Forsyth Street
Suite 202
Atlanta, GA 30303
(404) 523-2721

STEVEN R. SHAPIRO
American Civil Liberties Union Foundation
125 Broad Street
New York, NY 10004
(212) 549-2500

Counsel for Amicus Curiae

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

40 pp

TABLE OF CONTENTS

		Page
TABLE OF AUTHORITIES		ii
INTEREST OF AMICUS CURIAE		1
SUMMARY OF ARGUMENT		1
ARGUMENT		3
I.	Introduction	3
II.	The Voting Rights Act and the Importance of Majority-Minority Districts	4
III.	Challenges to the Voting Rights Act	7
IV.	Majority White and Majority Nonwhite Districts; Dual Standards	11
V.	Mistaken Assumptions about Segregation	18
VI.	The Comparison with Affirmative Action	22
VII.	The Shaw/Miller Standards Are Unworkable	25
VIII.	The Significance of Black Victories in 1996	27
CONCLUSION		30

TABLE OF AUTHORITIES

Page

CASES:

Abrams v. Johnson, Nos. 95-1425 & 95-1460 28

Abrams v. Johnson, 117 S.Ct. 1925 (1997) 1, 3, 10, 12, 17, 27

Adarand Constructors, Inc. v. Pena, 115 S.Ct. 2097 (1995) 23

Allen v. Wright, 468 U.S. 737 (1984) 15

Arlington Heights v. Metropolitan Housing Development Corp. 429 U.S. 252 (1977) 16, 17

Burton v. Sheheen, 793 F.Supp. 1329 (D.S.C. 1992) 6

Busbee v. Smith, 549 F.Supp. 494 (D.D.C. 1982) 6, 23

Bush v. Vera, 116 S.Ct. 1941 (1996) 3, 4, 10, 13, 25

Chapman v. Meier, 420 U.S. 1 (1975) 26

City of Memphis v. Greene, 451 U.S. 100 (1981) 17

City of Mobile v. Bolden, 446 U.S. 55 (1980) 17, 22

City of Richmond v. J.A. Croson, Co., 488 U.S. 469 (1989) 23

Currie v. Foster, No. 97-CV-368 (W.D.La.) 8

Daly v. High, No. 5:96 CV 86-V (W.D.N.C.) 8

Davis v. Bandemer, 478 U.S. 109 (1986) 7, 22

DeGrandy v. Wetherell, 794 F.Supp. 1076 (N.D. Fla. 1992) 6

DeWitt v. Wilson, 115 S.Ct. 2637 (1995) 11

Diaz v. Silver, 932 F.Supp. 462 (E.D.N.Y. 1996) 8

TABLE OF AUTHORITIES – Continued

Page

Diaz v. Silver, CV-95-2591 (E.D.N.Y. Feb. 26, 1997) 11

Gaffney v. Cummings, 412 U.S. 735 (1973) 13

Gomillion v. Lightfoot, 364 U.S. 339 (1960) 12

Growe v. Emison, 507 U.S. 25 (1993) 26

Hays v. Louisiana, 839 F.Supp. 1188 (W.D. La. 1993) 6, 8

Hays v. Louisiana, 862 F.Supp. 119 (W.D.La. 1994) 21

Hays v. Louisiana, 936 F.Supp. 360 (W.D.La. 1996) 10

Holder v. Hall, 512 U.S. 874 (1994) 1

Johnson v. Miller, 864 F.Supp. 1354 (S.D.Ga. 1994) 6, 8, 15, 21

Johnson v. Miller, 922 F.Supp. 1552 (S.D.Ga. 1995) 14, 20

Johnson v. Miller, 929 F.Supp. 1529 (S.D.Ga. 1996) 8

Johnson v. Mortham, 926 F.Supp. 1460 (N.D.Fla. 1996) 8, 10

Jordan v. Winter, 604 F.Supp. 807 (N.D. Miss. 1984) 6

Katzenbach v. Morgan, 384 U.S. 641 (1966) 21

King v. State Board of Elections, 979 F.Supp. 582 (N.D.Ill. 1996) 8

King v. Illinois Board of Election, 118 S.Ct. 877 (1998) 11

Kusper v. Pontikes, 414 U.S. 51 (1973) 11

Lawyer v. Department of Justice, 117 S.Ct. 2186 (1997) 11

Leonard v. Beasley, Civ. No. 3:96-CV-3540 (D.S.C.) 8

TABLE OF AUTHORITIES – Continued

Page

Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992) 14

Major v. Treen, 574 F.Supp. 325 (E.D.La. 1983)..... 6

McCain v. Lybrand, 465 U.S. 236 (1984) 1

Miller v. Johnson, 115 S.Ct. 2475 (1995) ..... *passim*

Moon v. Meadows, 952 F.Supp. 1141 (E.D.Va. 1997) ..8, 10

NAACP v. Button, 371 U.S. 415 (1963) 11

Personnel Administrator of Massachusetts v. Feeney, 442 U.S. 256 (1979) 16, 17

Quilter v. Voinovich, 912 F.Supp. 1006 (N.D.Oh. 1995)..... 8

Quilter v. Voinovich, 981 F.Supp. 1032 (N.D.Oh. 1997)..... 11

Reno v. Bossier Parish School Board, 117 S.Ct. 1491 (1997)..... 1

Rice v. Smith, CA No. 97-A-715-E (M.D.Ala.)..... 8

Rogers v. Lodge, 458 U.S. 613 (1982)..... 5

Scott v. U.S. Dept. of Justice, 920 F.Supp. 1248 (M.D.Fla. 1996)..... 8

Shaw v. Barr, 808 F.Supp. 461 (E.D.N.C. 1992).....6, 8

Shaw v. Hunt, 116 S.Ct. 1894 (1996).....3, 10

Shaw v. Reno, 509 U.S. 620 (1993) ..... *passim*

Smith v. Beasley, 946 F.Supp. 1174 (D.S.C. 1996)..... 8

South Carolina v. Katzenbach, 383 U.S. 301 (1966) 8, 19, 21

TABLE OF AUTHORITIES – Continued

Page

The Slaughter-House Cases, 83 U.S. (16 Wall) 36 (1873)..... 18

Thomas v. Bush, No. A-95-CA 18655 (W.D.Tex.) 8

Thornburg v. Gingles, 478 U.S. 30 (1986).....5, 18

United Jewish Organizations of Williamsburg, Inc. v. Carey, 430 U.S. 144 (1977).....22, 23

United States v. Hays, 115 S.Ct. 2431 (1995)..... 1

United States v. Scott, 437 U.S. 82 (1978)..... 4

United States v. Students Challenging Regulatory Agency Procedures, 412 U.S. 669 (1973)..... 16

Vera v. Richards, 861 F.Supp. 1304 (S.D.Tex. 1994) 6, 8, 13

Washington v. Davis, 426 U.S. 229 (1976)..... 17

Wesch v. Hunt, 785 F.Supp. 1491 (S.D. Ala.)..... 6

Wygant v. Jackson Board of Ed., 476 U.S. 267 (1986)..... 23

CONSTITUTIONAL PROVISIONS:

Fourteenth Amendment..... *passim*

Fifteenth Amendment..... 21

STATUTORY PROVISIONS:

Civil Rights Act of 1957 9

Civil Rights Act of 1960 9

Civil Rights Act of 1964 9

Voting Rights Act of 1965..... 1, 3, 9

TABLE OF AUTHORITIES – Continued

Page

42 U.S.C. § 1973, Section 2. . . . . 3, 5

42 U.S.C. § 1973c, Section 5. 5

CONGRESSIONAL REPORTS:

S.Rep. No. 417, 97th Cong., 2d Sess. (1982). 20

Voting Rights Act: Hearings Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary, 97th Cong., 2d Sess. 662 (1982) 20

RULES:

S.Ct. Rule 37.3. 1

OTHER:

T. Alexander Aleinikoff & Samuel Issacharoff, "Race and Redistricting: Drawing Constitutional Lines After *Shaw v. Reno*," 92 Mich. L. Rev. 588 (1993) 26

Michael Barone & Grant Ujifusa, The Almanac of American Politics 1974 (1973). 7

James U. Blacksher, "Dred Scott's Unwon Freedom: The Redistricting Cases As Badges of Slavery," 39 *How. L. J.* 633 (1996) 24

David A. Bositis, Redistricting and Representation: The Creation of Majority-Minority Districts and the Evolving Party System in the South (Joint Center for Political and Economic Studies, 1995) 7, 19

TABLE OF AUTHORITIES – Continued

Page

David A. Bositis, "The future of majority-minority districts and black and Hispanic legislative representation," in Redistricting and Minority Representation (Bositis ed., 1998) 28, 29

Congressional Quarterly, Inc., Politics in America 1994: 103rd Congress (Phil Duncan ed., 1993) 12

Critical Race Theory: The Concept of "Race" in Natural and Social Science (E. Nathaniel Gates ed., 1997) 19

Armand Derfner, "Racial Discrimination and the Right to Vote," 26 Vand. L. Rev. 523 (1973) 8

Robert G. Dixon, Jr., Democratic Representation: Reapportionment in Law and Politics (1968) 7

Nathan Glazer, "Reflections on Citizenship and Diversity," in Diversity and Citizenship: Rediscovering American Nationhood (Gary J. Jacobsohn & Susan Dunn eds., 1996). 19

Bernard Grofman & Lisa Handley, "1990s Issues in Voting Rights," 65 Miss. L. J. 205 (1995) 26

Lisa Handley & Bernard Grofman, "The Impact of the Voting Rights Act on Minority Representation: Black Officeholding in Southern State Legislatures and Congressional Delegations" in Quiet Revolution in the South (C. Davidson & B. Grofman eds., 1994) 6

A. Leon Higginbotham, Jr., Gregory A. Clarick & Marcella David, *"Shaw v. Reno*: A Mirage of Good Intentions with Devastating Racial Consequences," 62 Ford. L. Rev. 1593 (1994) 9

TABLE OF AUTHORITIES – Continued

Page

Joint Center for Political and Economic Studies, Black Elected Officials: A National Roster (1993) 4

Pamela S. Karlan, "All Over the Map: The Supreme Court's Voting Rights Trilogy," 1993 Sup. Ct. Rev. 245 26

J. Morgan Kousser, The Shaping of Southern Politics: Suffrage Restriction and the Establishment of the One-Part South, 1880-1910 (1974) 8

J. Morgan Kousser, "*Shaw v. Reno* and the Real World of Redistricting and Representation," 26 Rut. L. J. 625 (1995) 8

Paul Lewinson, Race, Class, and Party: A History of Negro Suffrage and White Politics in the South (1932) 8

Cynthia A. McKinney, "A Product of The Voting Rights Act," The Washington Post, Nov. 26, 1996, p. A15 28

Frank R. Parker, Black Votes Count (1987) 9

Frank R. Parker, "The Constitutionality of Racial Redistricting: A Critique of *Shaw v. Reno*," 3 D. Col. L. Rev. 1 (1995) 15, 22, 26

Richard H. Pildes, "The Politics of Race," 108 Harv. L. Rev. 1359 (1995) 5, 29

Quiet Revolution in the South (C. Davidson & B. Grofman eds., 1994) 5, 6, 9

Mark Sherman, "Redrawn Districts Expected To Face Challenge," Atlanta Journal & Constitution, Aug. 2, 1995, p. B6 27

TABLE OF AUTHORITIES – Continued

Page

1990 U.S. Census, Population and Housing Profile, Congressional Districts of the 103rd Congress, C.Q. Weekly Report, V. 51, 3473-87 7

U.S. Commission on Civil Rights, Political Participation (1968) 4

Bill Wasson, "Wilder Plan Expected to Win Assembly OK," The Richmond News Leader, Dec. 3, 1991, p. 1 6

www2.state.ga.us/elections/federal.htm 28

INTEREST OF AMICI CURIAE[1]

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with nearly 300,000 members dedicated to defending the principles of liberty and equality embodied in the Constitution and this nation's civil rights laws. As part of that commitment, the ACLU has been active in defending the equal right of racial and other minorities to participate in the electoral process. Specifically, the ACLU has participated in numerous voting cases before this Court, both as direct counsel, *e.g.*, *McCain v. Lybrand*, 465 U.S. 236 (1984), *Holder v. Hall*, 512 U.S. 874 (1994), *Abrams v. Johnson*, 117 S.Ct. 1925 (1997), and as *amicus curiae*, *e.g.*, *United States v. Hays*, 115 S.Ct. 2431 (1995), *Reno v. Bossier Parish School Board*, 117 S.Ct. 1491 (1997).

SUMMARY OF ARGUMENT

Amicus respectfully suggests that this case offers an appropriate occasion for the Court to reconsider its redistricting cases that began with *Shaw v. Reno*, 509 U.S. 620 (1993). Majority-minority districts, which have been systematically challenged in the wake of *Shaw*, have been the key to the increase in black office holding since passage of the Voting Rights Act of 1965. By creating lenient standing rules for white voters and relieving them of the obligation to show that majority-minority districts have

---

[1] Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3. This brief was not authored in whole or in part by counsel for a party and no person or entity, other than the *amicus curiae*, its members, or its counsel, made a monetary contribution to the preparation or submission of this brief.

been drawn for a discriminatory purpose, *Shaw* and its progeny have transformed the Fourteenth Amendment from a law designed to prohibit discrimination against racial minorities to one that can now be used to dismantle majority-minority districts and allow whites once again to maximize their control of the electoral process.

The majority-minority districts created after the 1990 census were the most racially integrated districts in the country. Not only have they not caused segregation or other harm, but they have ameliorated to some extent the affliction of racial bloc voting and have thus bestowed a benefit upon the electorate and society as a whole.

In requiring strict scrutiny of majority-minority districts, the *Shaw* cases have singled nonwhites out for special, discriminatory treatment in the redistricting process. While whites are acknowledged to have a constitutionally protected right to organize politically, the comparable efforts of nonwhites alone are deemed constitutionally suspect. Such a result violates the concept of equal treatment under the Fourteenth Amendment.

Experience has shown that, contrary to this Court's intent, the *Shaw* standards, have proven both unworkable and unfair. Legislators no longer know when the consideration of race in redistricting is required, permissible, or impermissible. Because of the absence of clear and reliable standards, the federal courts have been drawn increasingly and unnecessarily into the redistricting process.

The decision below should be reversed because plaintiffs failed to prove a cognizable injury and that the legislature acted with a discriminatory purpose. To the extent that *Shaw v. Reno* and its progeny are inconsistent

with reversal, those decisions should be reconsidered and reversed.

ARGUMENT

I. Introduction

This case provides the Court with an opportunity to reconsider its line of redistricting cases that began with *Shaw v. Reno*.[2] As described more fully below, the *Shaw* cases have created legal and political confusion. Legislators no longer know the extent to which race can or should be taken into account in drawing district lines. The result of that confusion has been to draw the federal courts increasingly, and unnecessarily, into the redistricting process. *Shaw* and its progeny have also created rules that give special preferences to whites and shackle racial minorities with special disadvantages in redistricting. Five years after *Shaw* we are witnessing a systematic attack on majority-minority districts, which threatens to erode the gains in minority political participation so laboriously accumulated since passage of the Voting Rights Act of 1965, 42 U.S.C. § 1973 *et seq*.

This Court has acknowledged that states may legitimately consider race in redistricting for a variety of reasons – to overcome the effects of prior and continuing discrimination, to comply with the Fourteenth Amendment and the Voting Rights Act, or simply to recognize communities that have a particular racial or ethnic makeup to account for their common, shared interests.

---

[2] The cases following *Shaw* are Miller v. Johnson, 115 S.Ct. 2475 (1995), Shaw v. Hunt, 116 S.Ct. 1894 (1996), Bush v. Vera, 116 S.Ct. 1941 (1996), and Abrams v. Johnson, 117 S.Ct. 1925 (1997).

Amicus submits that, prior to the millennium census and the next round of redistricting, the Court should frankly admit that the *Shaw* cases demand reconsideration, and that federal judicial intrusion in redistricting is warranted only when the creation of majority-minority districts causes cognizable harm, such as the denial or abridgment of the right to vote or participate equally in the electoral process.[3]

II. The Voting Rights Act and the Importance of Majority- Minority Districts

On the eve of passage of the Voting Rights Act there were fewer than 100 black elected officials in the entire 11 states of the Old Confederacy. U.S. Commission on Civil Rights, *Political Participation* 15 (1968). By January, 1993 the number had increased to 4,924. Joint Center for Political and Economic Studies, *Black Elected Officials: A National Roster* xxiii (1993).[4] This increase was caused primarily by the creation of majority-minority districts pursuant to the preclearance provisions of Section 5 of

---

[3] Two members of the Court have stated or implied that they would abandon *Shaw*. *See* Bush v. Vera, 116 S.Ct. at 1975 ("I would return to the well-traveled path that we left in *Shaw I*") (Stevens, J., dissenting); *id.* at 2011 ("while I take the commands of *stare decisis* very seriously, the problems with *Shaw* and its progeny are themselves very serious") (Souter, J., dissenting). Where "the lessons of experience" have shown a decision to be wrong or unworkable, the Court has not hesitated to overrule it. United States v. Scott, 437 U.S. 82, 101 (1978).

[4] This is not to suggest, however, that blacks in the South hold office in anything approaching their percent of the population. While blacks are 19.2% of the region's population, they are only 6.1% of its elected officials. *National Roster* at 1, 39, 93, 105, 175, 237, 319, 377, 399, 409, 439.

the Act, 42 U.S.C. § 1973c, and the vote dilution provisions of Section 2 of the Act, 42 U.S.C. § 1973.[5] Any doubts in that regard were effectively eliminated by publication of *Quiet Revolution in the South* (C. Davidson & B. Grofman eds., 1994), the most comprehensive, systematic study ever undertaken of the Voting Rights Act.[6] In particular, that study supports three critical findings:

> First, the increase in the number of blacks elected to office in the South is a product of the increase in the number of majority-black districts and not of blacks winning in majority-white districts. Second, even today black populations well above 50 percent appear necessary if blacks are to have a realistic opportunity to elect representatives of their choice in the South. Third, the increase in the number of black districts in the South is primarily the result not of redistricting changes based on population shifts as reflected in the decennial census but, rather, of those required by the Voting Rights Act.

---

[5] This Court has recognized the tendency of at-large elections to submerge or dilute the voting strength of cohesive minority communities "by permitting the political majority to elect *all* representatives of the district." Rogers v. Lodge, 458 U.S. 613, 616 (1982). The use of majority-minority districts has been an obvious, and successful, way of countering the debilitating effects of at-large bloc voting by the majority. Thornburg v. Gingles, 478 U.S. 30, 50 (1986).

[6] *Quiet Revolution* was a collaborative effort by 27 political scientists, historians, and lawyers funded by the National Science Foundation. According to Professor Richard Pildes, *Quiet Revolution* is "[u]tterly free of ideological cant . . . [and] presents the most sober, comprehensive, and significant empirical study of the precise effects of the VRA ever undertaken." Richard H. Pildes, "The Politics of Race," 108 Harv. L. Rev. 1359, 1362 (1995).

Lisa Handley & Bernard Grofman, "The Impact of the Voting Rights Act on Minority Representation: Black Officeholding in Southern State Legislatures and Congressional Delegations" in *Quiet Revolution* at 335-36.

The impact of the Act has been particularly visible and dramatic at the congressional level. Fifteen new majority-minority congressional districts were created in the South in the 1980s and 1990s as a result of litigation, the threat of litigation, or the Section 5 preclearance process.[7]

---

[7] Vote dilution litigation in the 1980s produced majority black districts in Georgia (the 5th) (Busbee v. Smith, 549 F.Supp. 494 (D.D.C. 1982)), Louisiana (the 2d) (Major v. Treen, 574 F.Supp. 325, 355 (E.D.La. 1983)), and Mississippi (the 2d) (Jordan v. Winter, 604 F.Supp. 807, 813 (N.D. Miss. 1984)). Similar litigation in the 1990s produced a majority black congressional district in Alabama (the 7th) (Wesch v. Hunt, 785 F.Supp. 1491, 1498-99 (S.D. Ala.)), two in Florida (the 3d and 17th), and a third (the 23d) in which blacks and Hispanics combined were the majority (DeGrandy v. Wetherell, 794 F.Supp. 1076, 1088 (N.D. Fla. 1992)), and one in South Carolina (the 6th) (Burton v. Sheheen, 793 F.Supp. 1329, 1367-69 (D.S.C. 1992)). During the 1990s Section 5 objections, or threatened objections, by the Attorney General also resulted in the creation of two additional majority black districts in Georgia (the 2d and 11th) (Johnson v. Miller, 864 F.Supp. 1354, 1366 (S.D.Ga. 1994)), one additional district in Louisiana (the 4th) (Hays v. Louisiana, 839 F.Supp. 1188, 1196 n.21 (W.D. La. 1993)), and two in North Carolina (the 1st and 12th) (Barr v. Shaw, 808 F.Supp. 461, 464 (E.D.N.C. 1992)). The threat of litigation or objections to preclearance by civil rights organizations was a factor in the creation of a second majority black district in Texas (the 13th) (Vera v. Richards, 861 F.Supp. 1304, 1315 (S.D.Tex. 1994)), and one in Virginia (the 3d). *See* Bill Wasson, "Wilder Plan Expected to Win Assembly OK," The Richmond News Leader, Dec. 3, 1991, p. 1. The two other majority-minority districts in the South were the 9th (majority black) in Memphis, and the 18th (majority black and Hispanic) in Texas. Michael Barone & Grant Ujifusa, The Almanac of American Politics 1974 (1973).

The increase in majority black districts was followed by an increase in black elected officials. Seventeen of the majority-minority congressional districts – and none of the majority white districts – elected a black in 1992. 1990 U.S. Census, Population and Housing Profile, Congressional Districts of the 103rd Congress, *C.Q. Weekly Report*, V. 51, 3473-87.[8]

III. Challenges to the Voting Rights Act

The Voting Rights Act has undeniably been the victim of its own success. Following the 1992 elections the courts were flooded with challenges by white voters who claimed that the majority black districts were unconstitutional racial gerrymanders.[9] Lawsuits challenging congressional plans were filed in North Carolina (*Shaw v.*

---

[8] There were also substantial increases in the number of majority-minority state legislative districts, and a corresponding increase in black legislators following the 1990 redistricting. In the South, the number of black state senators increased from 43 to 67, and the number of black house members from 159 to 213. David A. Bositis, Redistricting and Representation: The Creation of Majority-Minority Districts and the Evolving Party System in the South 46-7 (Joint Center for Political and Economic Studies, 1995).

[9] Since all districting is designed to advance the interests of particular voters or groups, *e.g.*, incumbents, Democrats, farmers, coastal residents, suburbanites, etc., one leading expert has said that "[a]ll districting is 'gerrymandering.' " Robert G. Dixon, Jr., Democratic Representation: Reapportionment in Law and Politics 462 (1968). In Davis v. Bandemer, 478 U.S. 109, 132 (1986), this Court defined a gerrymander as an electoral arrangement that denies or degrades "a voter's or a group of voters' influence on the political process as a whole."

Barr, 808 F.Supp. at 465-66), Texas (*Vera v. Richards*, 861 F.Supp. at 1309), Louisiana (*Hays v. Louisiana*, 839 F.Supp. at 1190-91), Florida (*Johnson v. Mortham*, 926 F.Supp. 1460 (N.D.Fla. 1996)), New York (*Diaz v. Silver*, 932 F.Supp. 462 (E.D.N.Y. 1996)), Virginia (*Moon v. Meadows*, 952 F.Supp. 1141 (E.D.Va. 1997)), Georgia (*Johnson v. Miller*, 864 F.Supp. at 1359), Illinois (*King v. State Board of Elections*, 979 F.Supp. 582 (N.D.Ill. 1996)), South Carolina (*Leonard v. Beasley*, Civ. No. 3:96-CV-3540 (D.S.C.)), and Alabama (*Rice v. Smith*, CA No. 97-A-715-E (M.D.Ala.)).[10]

This litigation reflected a well established historical pattern. As this Court and others have poignantly observed, political mobilization in the black community, particularly in the South, has rarely gone unopposed since Reconstruction onwards. *South Carolina v. Katzenbach*, 383 U.S. 301, 310 (1966) (noting the adoption by various southern states beginning in 1890 of tests "specifically designed to prevent Negroes from voting"). *See also* J. Morgan Kousser, *The Shaping of Southern Politics: Suffrage Restriction and the Establishment of the One-Part South, 1880-1910* (1974); Paul Lewinson, *Race, Class, and Party: A History of Negro Suffrage and White Politics in the South* (1932); Armand Derfner, "Racial Discrimination and the Right to Vote," 26 *Vand. L. Rev.* 523 (1973). In

[10] Similar challenges were filed against majority black state legislative districts in South Carolina (Smith v. Beasley, 946 F.Supp. 1174, 1175 (D.S.C. 1996)), Florida (Scott v. U.S. Dept. of Justice, 920 F.Supp. 1248 (M.D.Fla. 1996)), Texas (Thomas v. Bush, No. A-95-CA 18655 (W.D.Tex.)), Georgia (Johnson v. Miller, 929 F.Supp. 1529 (S.D.Ga. 1996)), Louisiana (Currie v. Foster, No. 97-CV-368 (W.D.La.)), North Carolina (Daly v. High, No. 5:96 CV 86-V (W.D.N.C.)) and, Ohio (Quilter v. Voinovich, 912 F.Supp. 1006 (N.D.Oh. 1995)).

modern times the Voting Rights Act, which has been the single most effective tool of black enfranchisement in our nation's history, has become a natural lightning rod for this opposition. *See, e.g.*, Frank R. Parker, *Black Votes Count* 34-5 (1987) (describing as a "massive resistance" campaign the efforts by Mississippi's white leadership to blunt the increase in black voter registration after passage of the 1965 Act).[11]

The first of the modern reverse discrimination cases to reach the Court following the 1990 census was *Shaw v. Reno*, a challenge to congressional redistricting in North Carolina and a precursor to this case.[12] In *Shaw*, the Court held that plaintiffs who alleged that districts were

[11] Similar efforts in other southern states to thwart the civil rights acts of 1957, 1960, 1964, and 1965 are discussed in the various state chapters in *Quiet Revolution*.

[12] It is not surprising that the latest backlash erupted in the context of congressional redistricting. The creation of majority black districts for county commissions and city councils, while important at the local level and by no means uncontroversial, lacked the visibility and impact of the creation of majority black districts for Congress. Members of Congress, axiomatically, wield national political power, and the election of blacks to national office is more likely to galvanize attention and opposition. There was also the critical issue of the sheer number of blacks elected to Congress. Courts and social scientists have frequently commented on the "tipping phenomenon," where whites flee a neighborhood or the public schools when the perception takes hold that there has been "too much" integration. *See, e.g.*, A. Leon Higginbotham, Jr., Gregory A. Clarick & Marcella David, "*Shaw v. Reno*: A Mirage of Good Intentions with Devastating Racial Consequences," 62 Ford. L. Rev. 1593, 1632 n.194 (1994). The unprecedented success of black congressional candidates in the 1992 elections had a similar impact, at least for some.

"bizarre" or "irrational" in shape, and were "unexplainable on grounds other than race," stated a claim for relief under the equal protection clause of the Fourteenth Amendment. 509 U.S. at 643, 658.

Two years later the Court expanded on *Shaw* when it held that a bizarre district shape was not a prerequisite for a constitutional challenge but was simply one way of proving a suspect racial classification or purpose. *See Miller v. Johnson*, 115 S.Ct. at 2485. As the Court explained in *Miller*, a plaintiff could establish

> either through circumstantial evidence of a district's shape and demographics or more direct evidence going to legislative purpose, that race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district.

Id., at 2488. In sum, the plaintiffs' burden under *Miller* is to "show that the State has relied on race in substantial disregard of customary and traditional districting practices." *Id.* at 2497 (O'Connor, J., concurring).

Applying the rules in *Shaw* and *Miller*, the Court has struck down majority-minority districts in North Carolina (the 12th) (*Shaw v. Hunt*, 116 S.Ct. at 1907), Georgia (the 11th) (*Miller v. Johnson*, 115 S.Ct. at 2494) (the 2d) (*Abrams v. Johnson*, 117 S.Ct. at 1935), and Texas (the 18th, 29th, and 30th) (*Bush v. Vera*, 116 S.Ct. at 1951). Lower courts have done the same to majority-minority congressional districts in Florida (the 3d) (*Johnson v. Mortham*, 926 F.Supp. at 1495), Virginia (the 3d) (*Moon v. Meadows*, 952 F.Supp. at 1150), Louisiana (the 4th) (*Hays v. Louisiana*, 936 F.Supp. 360, 371 (W.D.La. 1996)), and New York (the

12th) (*Diaz v. Silver*, CV-95-2591 (E.D.N.Y. Feb. 26, 1997)).[13]

There is nothing sinister or unlawful about the desires or efforts of whites to elect candidates of their choice, including candidates of their own race. To the contrary, the "freedom to associate with others for the common advancement of political beliefs and ideas is a form of 'orderly group activity' protected by the First and Fourteenth Amendments." *Kusper v. Pontikes*, 414 U.S. 51, 56-7 (1973) (*quoting NAACP v. Button*, 371 U.S. 415, 430 (1963)). What *is* indefensible is that under the *Shaw* cases the freedom of whites to associate for the common advancement of political beliefs and ideas, including the right to construct and run in majority white districts, is deemed constitutionally protected, while the comparable efforts of blacks and other nonwhites are deemed constitutionally suspect.

IV. Majority White and Majority Nonwhite Districts; Dual Racial Standards

One principle that has emerged with disturbing clarity from the *Shaw* cases is that they "place at a *dis* advantage the very group, African Americans, whom the Civil

---

[13] Not all the *Shaw/Miller* challenges have succeeded. The Court summarily affirmed without opinion lower court decisions rejecting challenges to congressional plans in California (DeWitt v. Wilson, 115 S.Ct. 2637 (1995)), and Illinois (King v. Illinois Board of Election, 118 S.Ct. 877 (1998), *aff'g*, 979 F.Supp. 582, 619 (N.D.Ill. 1996), as well as a legislative plan in Ohio (Quilter v. Voinovich, 981 F.Supp. 1032 (N.D.Oh. 1997), *aff'd*, 118 S.Ct. 1358 (1998)). The Court also affirmed the decision of the district court rejecting a challenge to a legislative redistricting settlement in Florida. Lawyer v. Department of Justice, 117 S.Ct. 2186 (1997).

War Amendments sought to help." *Abrams v. Johnson*, 117 S.Ct. at 1950 (Breyer, J., dissenting). The Court has never invalidated a majority white district on account of its bizarre shape, or because the jurisdiction subordinated its traditional redistricting principles to race, although there is a long and continuing history of protecting white incumbents through the creation of majority white districts, including those that are highly irregular in shape and disregard "traditional" districting principles.[14]

For example, the *Congressional Quarterly* has described District 4 in Tennessee (96% white) as "a long, sprawling district, extending nearly 300 miles . . . from east to west it touches four States – Mississippi, Alabama, Kentucky, and Virginia." Congressional Quarterly, Inc., *Politics in America 1994: 103rd Congress* 1418 (Phil Duncan ed., 1993). The 11th District in Virginia (81% white) has "a shape that vaguely recalls the human digestive tract." *Id.* at 1602. District 9 in Washington (85% white) has a " 'Main Street' [which] is a sixty-mile stretch of Interstate 5." *Id.* at 1635. District 13 in Ohio (94% white) "centers around two distinct sets of communities . . . [t]he Ohio Turnpike is all that connects the two." *Id.* at 1210. Yet no court, even after *Shaw*, has held or suggested that any of these oddly shaped districts is constitutionally suspect.

To the contrary, such majority white districts have always been regarded as immune from challenge under the Court's often stated principle that a regular looking

---

[14] Gomillion v. Lightfoot, 364 U.S. 339 (1960), is not to the contrary. In *Gomillion*, the Court held that the redefinition of the city of Tuskegee's boundaries "was not an ordinary geographic redistricting measure" but was subject to challenge because it removed most of the city's black residents denying them "the right to vote in municipal elections." 364 U.S. at 341.

district shape was not a federal constitutional requirement. *Gaffney v. Cummings*, 412 U.S. 735, 752 n.18 (1973) (district "compactness or attractiveness has never been held to constitute an independent federal requirement"). Even *Shaw v. Reno* acknowledged that a compact district shape was "not . . . constitutionally required," 509 U.S. at 647, an acknowledgment that is difficult to reconcile with the Court's contradictory holding that "reapportionment is one area in which appearances do matter," *id.* at 647, and that the 12th District in North Carolina was subject to challenge because of its non-compact, or "extremely irregular," shape. *Id.* at 642.

In the Texas redistricting case, filed in 1994, the plaintiffs challenged 24 of the state's 30 congressional districts, 18 of which were majority white. *Vera v. Richards*, 861 F.Supp. at 1309. The district court invalidated just three districts, the only two that were majority black and one that was majority Hispanic. *Id.* at 1343-44. The court admitted that the other districts were irregular or bizarre in shape, but held that they were constitutional because they were "disfigured less to favor or disadvantage one race or ethnic group than to promote the re-election of incumbents." *Id.* at 1309. Thus, the oddly shaped majority white districts, designed to keep white incumbents in office, were tolerable as "political" gerrymanders, while the oddly shaped majority black districts, designed to provide black voters the equal opportunity to elect candidates of their choice, were intolerable as "racial" gerrymanders.

On appeal, this Court affirmed. According to the Court "political gerrymandering" was not subject to strict scrutiny. *Bush v. Vera*, 116 S.Ct. at 1954. For that reason "irregular district lines" could be drawn for "incumbency

protection" and "to allocate seats proportionately to major political parties." *Id. See also id.* at 1972 ("[d]istricts not drawn for impermissible reasons or according to impermissible criteria may take any shape, even a bizarre one") (Kennedy, J., concurring). Amicus respectfully submits that the creation of a dual standard in redistricting depending on whether a district is majority white or nonwhite is inconsistent with fundamental notions of equal protection under the Fourteenth Amendment.[15]

The *Shaw* cases have also established special standing rules to facilitate challenges by white voters to majority-minority districts. The Court has described standing as "an essential and unchanging part of the case-or-controversy requirement of Article III," that includes, among other things, the requirement of "an 'injury in fact' – an invasion of a legally protected interest which is . . . concrete and particularized." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

In *Shaw v. Reno*, however, the plaintiffs "did not claim that the General Assembly's reapportionment plan unconstitutionally 'diluted' white voting strength." *Shaw v. Reno*, 509 U.S. at 641.[16] Even more dramatically, the

---

[15] Blacks have also frequently been denied the advantages of incumbency. In Johnson v. Miller, 929 F.Supp. 1552, 1565 (S.D.Ga. 1995), the district court took note of the state's historic policy of drawing district lines "so incumbents remain in their districts in a new plan and to avoid placing two incumbents in the same districts." In its remedial plan, however, the court placed a black incumbent (McKinney) in a new district and put a white incumbent in the district of another black incumbent (Bishop). *Id.*

[16] Nor, as Justice White pointed out, could they. Whites were 79% of the state's VAP but a majority in ten (83%) of its 12 congressional districts. Shaw v. Reno, 509 U.S. at 666-67 (White, J., dissenting). One commentator has described the *Shaw* plaintiffs "not as injured parties, but as spoilers, intent on eliminating the new majority-black districts as a matter of principle." Frank R. Parker, "The Constitutionality of Racial Redistricting: A Critique of *Shaw v. Reno*," 3 D. Col. L. Rev. 1, 9 (1995).

three-judge court in *Miller* made an express finding that "the plaintiffs suffered no individual harm; the 1992 congressional redistricting plans had no adverse consequences for these white voters." *Johnson v. Miller*, 864 F.Supp. at 1370. The lack of a concrete and personal injury should have denied both the *Shaw* and *Miller* plaintiffs standing to bring their cases to federal court.

The Court nonetheless found that the plaintiffs in each case had standing because they alleged that their right to participate in a "color-blind" electoral process had been violated. *Shaw v. Reno*, 509 U.S. at 641; *Miller v. Johnson*, 115 S.Ct. at 2485-86 (the essence of plaintiffs' equal protection claim is not that their voting strength has been minimized or canceled out, but "that the State has used race as a basis for separating voters into districts"). The injury identified by the Court was in being "stereotyped" or "stigmatized" by a racial classification. *Miller v. Johnson*, 115 S.Ct. at 2486; *Shaw v. Reno*, 509 U.S. at 643.

In prior cases involving black plaintiffs, however, the Court held that a similar abstract, hypothetical, or stigmatic injury was *not* sufficient to confer standing to challenge discriminatory governmental action. For example, in *Allen v. Wright*, 468 U.S. 737, 754 (1984), the Court rejected a challenge by blacks to alleged discrimination

by the Internal Revenue Service because "stigmatic injury, or denigration" suffered by members of a racial group when the Government discriminates on the basis of race was insufficient harm to confer standing. Allowing standing in the absence of direct injury would, according to the Court, "transform the federal courts into 'no more than a vehicle for the vindication of the value interests of concerned bystanders.' " *Id.* at 756 (*quoting United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669, 687 (1973)).

Shaw and *Miller* have thus established a liberal rule of standing in the absence of direct injury for whites challenging majority-minority districts that is different from the restrictive rule of standing applied to blacks challenging official action as being discriminatory.

In addition, *Shaw* also relaxed the requirement that white plaintiffs prove the state intended to discriminate against them in enacting a challenged redistricting plan. The *Shaw v. Reno* plaintiffs did not claim that the state's plan was enacted for the purpose of diluting white voting strength. 509 U.S. at 641. Indeed, the legislature's admitted purpose in creating majority black districts was the entirely nondiscriminatory one of complying with the Voting Rights Act. *Id.* at 635, 655. The Court reasoned, however, that even though a districting plan was facially neutral, a racial classification was apparent or "express" where a majority black district had a "bizarre" shape, and that accordingly "[n]o inquiry into legislative purpose is necessary." *Id.* at 642.[17] This is markedly different than

[17] The cases principally relied upon by the Court, Personnel Administrator of Massachusetts v. Feeney, 442 U.S. 256 (1979), and Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252 (1977), do not support its analysis. In *Arlington Heights*, the Court held that a severe discriminatory impact may support an inference of discriminatory purpose, but that "[p]roof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause." 429 U.S. at 265. In *Feeney*, in a passage omitted in Shaw v. Reno, the Court held that "even if a neutral law has a disproportionately adverse effect upon a racial minority, it is unconstitutional under the Equal Protection Clause only if that impact can be traced to a discriminatory purpose." 442 U.S. at 272. *A fortiori*, the cases relied upon by the Court do not support the proposition that a facially neutral classification that has no discriminatory impact can be unconstitutional absent proof of a discriminatory purpose.

the standard applied by the Court in other civil rights contexts.

Since *Washington v. Davis*, 426 U.S. 229 (1976), the Court has required proof of a discriminatory purpose to establish a violation of the Fourteenth Amendment. And in *City of Mobile v. Bolden*, 446 U.S. 55 (1980), the Court applied that rule to the voting context. In setting aside a constitutional challenge by black voters to municipal at-large elections, the Court stressed that "only if there is purposeful discrimination can there be a violation of the Equal Protection Clause." *Id.* at 66. Even proof that black voting strength in the city had been diluted was, according to the Court, "most assuredly insufficient to prove an unconstitutionally discriminatory purpose." *Id.* at 73. *Accord, City of Memphis v. Greene*, 451 U.S. 100, 119 (1981) ("the absence of proof of discriminatory intent forecloses any claim that the official action challenged in this case violates the Equal Protection Clause").[18]

[18] In light of *Shaw*, whites challenging discrimination under the Constitution also have a lower burden of proof than blacks challenging discrimination under the Voting Rights Act. Such a

Shaw/Miller's new cause of action based on bizarre district shape, new dual standard depending on whether a district is majority white or non-white, and absence of the requirements of showing a discriminatory purpose and effect now allow the Fourteenth Amendment, which was intended to prohibit discrimination against minorities, *see The Slaughter-House Cases*, 83 U.S. (16 Wall) 36, 81 (1873) (the Fourteenth Amendment was adopted to remedy "discrimination against the negroes as a class, or on account of their race"), to be used to destroy majority-minority districts and deprive blacks of equal political opportunities.

V. Mistaken Assumptions about Segregation

The underlying premise of the redistricting decisions is that creating nonwhite majority districts is a form of "segregation" which harms individuals and society. *Shaw v. Reno*, 509 U.S. at 641. Under this view, individuals are harmed because of "the offensive and demeaning assumption that voters of a particular race, because of their race, 'think alike, share the same political interests, and will prefer the same candidates at the polls.' " *Miller v. Johnson*, 115 S.Ct. at 2486. Society is allegedly harmed because " '[r]acial gerrymandering . . . may balkanize us into competing racial factions.' " *Id.* As demonstrated below, each of these premises is seriously flawed.

The majority-minority districts in the South created after the 1990 census, far from being segregated, were the

---

result is anomalous given the purpose of the Act to ease the standard of proof in statutory challenges. Thornburg v. Gingles, 478 U.S. at 43-4.

most racially *integrated* districts in the country. They contained an average of 45% non-black voters. Bositis, *Redistricting and Representation* at 28. No one familiar with Jim Crow could confuse the highly integrated redistricting plans of the 1990s with racial segregation under which blacks were not allowed to vote or run for office. As Justice Stevens has recognized, plans containing majority-minority districts are a form of "racial integration." *Miller v. Johnson*, 115 S.Ct. at 2498 (Stevens, J., dissenting). Moreover, the notion that majority black districts are "segregated," and that the only integrated districts are those in which whites are the majority, is precisely the sort of race based concept which the Court has consistently deplored.

The premises of *Shaw* and *Miller* are flawed for the further reason that race is not merely an "assumption" or "stereotype," it is also a social and political fact of American life.[19] *See generally* Nathan Glazer, "Reflections on Citizenship and Diversity," in *Diversity and Citizenship: Rediscovering American Nationhood* (Gary J. Jacobsohn & Susan Dunn eds., 1996). Indeed, it is the acknowledgment of that fact that led Congress to enact the Voting Rights Act. *South Carolina v. Katzenbach*, 383 U.S. at 337 (describing the purpose of the Act to insure that "millions of nonwhite Americans will now be able to participate for the first time on an equal basis in the government under which they live").

---

[19] This is very different from saying that race is a scientific fact. *See* Critical Race Theory: The Concept of "Race" in Natural and Social Science ix (E. Nathaniel Gates ed., 1997) (scientists are now agreed that "race" has "no scientifically verifiable referents").

Lower courts applying the Act have reached the same conclusion. In *Miller v. Johnson*, for example, the trial court concluded that racial discrimination was such a pervasive feature of life in Georgia that it took judicial notice of it and dispensed with any requirement that it be proved. The district court also acknowledged that, on the basis of existing statewide racial bloc voting patterns, the Voting Rights Act required the creation of a majority black congressional district in the Atlanta metropolitan area to avoid dilution of black voting strength. *Johnson v. Miller*, 922 F.Supp. at 1568. Given the existence of racial bloc voting, treating blacks and whites as having different voting preferences is to acknowledge reality, not indulge stereotypes.

Nor is there any evidence that majority-minority districts have either caused or increased social or other harm. In 1982, opponents of the amendment of Section 2 claimed that the creation of majority-minority districts would "deepen the tensions, fragmentation and outright resentment among racial groups," Voting Rights Act: Hearings Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary, 97th Cong., 2d Sess. 662 (1982) (statement of John H. Bunzel), "pit race against race," *id.* at 745 (statement of Michael Levin), "foster polarization," *id.* at 1328 (statement of Donald L. Horowitz), and "compel the worst tendencies toward race-based allegiances and divisions." *Id.* at 1449 (letter from William Van Alstyne). Congress considered and rejected these claims because there was no evidence to support them. It concluded that the amendment would not "be a divisive factor in local communities by emphasizing the role of racial politics." S.Rep. No. 417, 97th

Cong., 2d Sess. 32-3 (1982). It found there was "an extensive, reliable and reassuring track record of court decisions using the very standard which the Committee bill would codify." *Id.*[20]

None of the *Shaw* cases, moreover, indicate that any of the theoretical harms suggested by the majority have in fact come to pass. In *Miller v. Johnson*, the witnesses at trial testified without contradiction that the challenged plan had not increased racial tension, caused segregation, imposed a racial stigma, deprived anyone of representation, caused harm, or guaranteed blacks congressional seats. *Johnson v. Miller*, Trial Transcript, Vol. III, p. 268; Vol. IV, pp. 194, 106, 239, 240, 242; Vol. VI, pp. 36, 38, 45, 47, 56, 58, 117, 120. The district court concluded that "the 1992 congressional redistricting plans had no adverse consequences for these white voters." *Johnson v. Miller*, 864 F.Supp. at 1370.

The district court reached a similar conclusion in *Hays v. Louisiana*. Although holding the state's congressional plan unconstitutional under *Shaw*, the district court nonetheless acknowledged "the great benefits that are derived by an increase in minority representation in government." 862 F.Supp. 119, 128 (W.D.La. 1994) (Shaw, J.,

---

[20] In the political sphere, where Congress has "a specially informed legislative competence," this Court has held that its duty is to determine only if there is "a basis upon which Congress might predicate a judgment" that a particular practice was a valid means of carrying out the commands of the Constitution. Katzenbach v. Morgan, 384 U.S. 641, 656 (1966). *Accord*, South Carolina v. Katzenbach, 383 U.S. at 337. There clearly was a basis upon which Congress could conclude that majority-minority districts did not cause social or other harm and were thus a valid means of implementing the Fourteenth and Fifteenth Amendments.

concurring). Minority elected officials, the court wrote, "have shown that they perform admirably," that their efforts in government "provide positive role models for all black citizens," and that they "insure that the legal obstacles to minority advancement in all areas of life will be eliminated." *Id.* In a similar vein, one veteran civil rights lawyer has said that, based on his experience in Mississippi, "the creation of majority-minority districts and the subsequent election of minority candidates reduces white fear and harmful stereotyping of minority candidates, ameliorates the racial balkanization of American society, and promotes a political system in which race does not matter as much as it did before." Parker, 3 *D. Col. L. Rev.* at 19-20.

VI. The Comparison with Affirmative Action

Prior to *Shaw*, the Court frequently noted that one of the essential purposes of redistricting was to "reconcile the competing claims of political, religious, ethnic, racial, occupational, and socioeconomic groups." *Davis v. Bandemer*, 478 U.S. at 147 (O'Connor, J., concurring). For that and other reasons, "legislators necessarily make judgments about the probability that the members of certain identifiable groups, whether racial, ethnic, economic, or religious, will vote in the same way." *City of Mobile v. Bolden*, 465 U.S. at 87 (Stevens, J., concurring). *See United Jewish Organizations of Williamsburg, Inc. v. Carey*, 430 U.S. 144, 176 n.4 (1977) ("[i]t would be naive to suppose that racial considerations do not enter into apportionment decisions").

Voting districts have regularly been drawn to accommodate the interests of racial or ethnic groups, such as Irish Catholics in San Francisco, Italian-Americans in

South Philadelphia, Polish-Americans in Chicago, and Anglo-Saxons in North Georgia. *Miller v. Johnson*, 115 S.Ct. at 2505 (Ginsburg, J., dissenting); *Busbee v. Smith*, 549 F.Supp. at 502 (in the state's 1980 congressional plan "keeping the cohesive [majority white] mountain counties together was crucial"). The Court specifically rejected a challenge by white voters in 1977 to a New York plan that "deliberately used race in a purposeful manner" to create nonwhite majority state legislative districts in order to comply with the Voting Rights Act. *United Jewish Organizations of Williamsburg, Inc. v. Carey*, 430 U.S. at 165. The Court held that the use of race to insure fairness and inclusiveness in redistricting did not impose a racial stigma and was proper where white voting strength was not diluted. *Id.* at 179-80.

In requiring strict scrutiny of nonwhite majority districts, *i.e.*, a showing that the districts are "narrowly tailored to achieve a compelling interest," *Miller v. Johnson*, 115 S.Ct. at 2490, the *Miller* majority drew heavily upon the affirmative action cases, indicating that majority-minority districts were simply another form of race based preferences. *Miller v. Johnson*, 115 S.Ct. at 2482.[21]

---

[21] In support of this proposition, *Miller* cited Adarand Constructors, Inc. v. Pena, 115 S.Ct. 2097, 2113 (1995) (subjecting to strict scrutiny "all racial classifications, imposed by whatever federal, state, or local governmental actor"), City of Richmond v. J.A. Croson, Co., 488 U.S. 469, 494 (1989) (declaring unconstitutional a municipal set aside for minority contractors), and Wygant v. Jackson Board of Ed., 476 U.S. 267, 274 (1986) (invalidating teacher layoff provisions of an affirmative action agreement).

Whether or not one thinks the affirmative action cases were rightly decided, their application to redistricting ignores the fundamental distinction between the race conscious allocation of limited employment or contractual opportunities and the far different task of reconciling the claims of political, ethnic, racial, and other groups in the redistricting process. *See Shaw v. Reno*, 509 U.S. at 675 ("efforts to remedy minority vote dilution are wholly unlike what typically has been labeled 'affirmative action' ") (White, J., dissenting). If anything, the current challenges to affirmative action only highlight the importance of assuring equal opportunity in the political process.

In light of the Court's recent decisions, racial minorities are now the only group that is targeted for special disadvantages in redistricting. All other groups – political, religious, occupational, or socioeconomic – may organize themselves freely and press for recognition in the redistricting process. The efforts of non-whites alone are subject to the exacting and debilitating standards of strict scrutiny. *See* James U. Blacksher, "Dred Scott's Unwon Freedom: The Redistricting Cases As Badges of Slavery," 39 *How. L. J.* 633, 634 (1996) ("it is black and Latino citizens alone who may not choose to associate with each other freely and try to optimize their legislative influence in pursuit of a common political agenda") (footnote omitted). Such a result cannot be reconciled with the purposes of the Fourteenth Amendment. As Justice Stevens wrote in *Shaw*:

> If it is permissible to draw boundaries to provide adequate representation for rural voters, for union members, for Hasidic Jews, for Polish Americans, or for Republicans, it necessarily follows that it is permissible to do the same thing for members of the very minority group whose history in the United States gave birth to the Equal Protection Clause.

509 U.S. at 679 (Stevens, J., dissenting).

VII. The Shaw /Miller Standards Are Unworkable

The *Shaw/Miller* standards have left legislators in a quandary as to when the consideration of race in redistricting is impermissible, permissible, or required. According to the Court, a legislature may properly "be aware of racial demographics," but it may not allow race to predominate in the redistricting process. *Miller v. Johnson*, 115 S.Ct. at 2488. A state "is free to recognize communities that have a particular racial makeup, provided its action is directed toward some common thread of relevant interests." *Id.* at 2490. Redistricting may be performed "with consciousness of race." *Bush v. Vera*, 116 S.Ct. at 1951. Indeed, it would be "irresponsible" for a State to disregard the racial fairness provisions of the Voting Rights Act. *Id.* at 1969 (O'Connor, J., concurring). A state may therefore "create a majority-minority district without awaiting judicial findings" if it has a strong basis in evidence for avoiding a Voting Rights Act violation. *Id.* at 1970. Even the Court has acknowledged that it "may be difficult" to make and apply such distinctions. *Miller v. Johnson*, 115 S.Ct. at 2488.

The Justices who have disagreed with the Court's new decisions have at various times said that the *Shaw* standards are "unworkable," *Abrams v. Johnson*, 117 S.Ct. at 1949 (Breyer, J., dissenting), *Bush v. Vera*, 116 S.Ct. at 2011 ("[t]he Court has been unable to provide workable standards") (Souter, J., dissenting), are "a jurisprudential wilderness that lacks a definable constitutional core," *Bush v. Vera*, 116 S.Ct. at 1975 (Stevens, J., dissenting), and

"render[ ] redistricting perilous work for state legislatures," *Miller v. Johnson*, 115 S.Ct. at 2507 (Ginsburg, J., dissenting). Justice Souter has recognized that "it is as impossible in theory as in practice to untangle racial considerations from the application of traditional districting principles in a society plagued by racial-bloc voting with a racial minority population of political significance." *Id.* at 2005-06 (dissenting).[22]

Because of the absence of clear and reliable standards the courts have increasingly been drawn into redistricting, which this Court has recognized "is primarily the duty and responsibility of the State through its legislature or other body, rather than of a federal court." *Chapman v. Meier*, 420 U.S. 1, 27 (1975). *Accord, Growe v. Emison*, 507 U.S. 25, 34 (1993). Faced with the prospect of being sued for a constitutional violation if they create majority-minority districts and sued for a Voting Rights Act violation if they do not, states will be strongly tempted to

[22] The views of the dissenters are widely shared by others. *See, e.g.*, Bernard Grofman & Lisa Handley, "1990s Issues in Voting Rights," 65 Miss. L. J. 205, 215 (1995) (*Shaw* "did not establish clearly manageable standards"); T. Alexander Aleinikoff & Samuel Issacharoff, "Race and Redistricting: Drawing Constitutional Lines After *Shaw v. Reno*," 92 Mich. L. Rev. 588, 651 (1993) ("[a]t the end of the day, *Shaw* remains an enigmatic decision"); Parker, 3 D. Col. L. Rev. at 43 (the *Shaw* standards are "vague and subjective"); Higginbotham, *et al.*, 62 Ford. L. Rev. at 1603 (describing *Shaw* as "obscure"); Pamela S. Karlan, "All Over the Map: The Supreme Court's Voting Rights Trilogy," 1993 Sup. Ct. Rev. 245; J. Morgan Kousser, "*Shaw v. Reno* and the Real World of Redistricting and Representation," 26 Rut. L. J. 625 (1995).

leave redistricting to the federal courts.[23] And those that do not will likely end up in court anyway. The flood of litigation generated by *Shaw* is itself proof of the accuracy of Justice Breyer's observation that, given the subjective nature of the applicable standards, "[a]ny redistricting plan will generate potentially injured plaintiffs, willing and able to carry on their political battles in a judicial forum." *Abrams v. Johnson*, 117 S.Ct. at 1950 (dissenting).

VIII. The Significance of Black Victories in 1996

In *Abrams v. Johnson* the Court cited the election of Cynthia McKinney and Sanford Bishop, the incumbents from the old 11th and 2d Districts in Georgia, to support its finding that whites had shown a "general willingness" to vote for black candidates and its conclusion that Section 2 did not require the creation of more than one majority black district in Georgia. 117 S.Ct. at 1936. Despite the white votes they received, the voting in McKinney's and Bishop's elections was in fact racially polarized.

In the Democratic primary, McKinney got only 13% of the white vote. She won the nomination because she got most of the black vote and whites mainly stayed home or voted in the Republican primary. White turnout

[23] That is what Georgia did. After the remand in Miller v. Johnson, the legislature met in special session to redistrict the Congress. After several weeks of discussion and plan drawing, the legislature adjourned without taking action, leaving redistricting to the federal court. Abrams v. Johnson, 117 S.Ct. at 1929. The chair of the senate reapportionment committee lamented that "[n]obody knows what they're doing." Mark Sherman, "Redrawn Districts Expected To Face Challenge," Atlanta Journal & Constitution, Aug. 2, 1995, p. B6.

was extremely low – only 11% of registered voters compared to 31% for blacks. As a consequence, the electorate in the Democratic primary was effectively majority black. *Abrams v. Johnson*, Nos. 95-1425 & 95-1460, Response of Appellants Lucious Abrams, Jr., *et al.*, to Appellees' Motion to Supplement the Record on Appeal, p. 2.

Running in a heavily Democratic district in the general election, McKinney increased her percentage of the white vote, but voting was still along racial lines. Most blacks again voted for McKinney while approximately 70% of whites voted for her white Republican opponent. David A. Bositis, "The future of majority-minority districts and black and Hispanic legislative representation," in *Redistricting and Minority Representation* 12 (Bositis ed., 1998). The voting in the new 2d District was similarly polarized. In the general election Bishop got most of the black vote but approximately 65% of whites voted for his white opponent. Bositis, "The future of majority-minority districts" at 14.

McKinney has credited her victory to the fact that she was initially elected in a majority black district and had an opportunity to establish a track record of service to constituents of both races. Cynthia A. McKinney, "A Product of The Voting Rights Act," *The Washington Post*, Nov. 26, 1996, p. A15. Non-incumbent blacks, by contrast, who ran in majority white congressional districts in 1996 in Arkansas, Mississippi, and Texas all lost. Bositis, "The future of majority-minority districts" at 38-9. McKinney and Bishop were reelected in 1998, but again both were running with the strong advantage of incumbency. www2.state.ga.us/elections/federal.htm.

Given the persistent patterns of racial bloc voting over time in the South, it is prudent to suggest that the

real test of the new majority white congressional districts which have elected minorities will come when non-incumbent minorities run for office. The recent elections may be a sign of a gradual thaw in voter attitudes. If so, they will underscore the value of highly integrated majority-minority districts to society and voters of all races in helping to ameliorate the affliction of racial bloc voting. But in the meantime, it is premature to claim that the electorate is suddenly color blind and that racial bloc voting no longer exists. *See* Bositis, "The future of majority-minority districts" at 15 ("[d]espite the noteworthy election of four black U.S. representatives in majority-white districts in 1996, there is little reason to believe that any significant barrier has been breached or that electoral politics in the United States have become de-racialized to any significant degree"); Pildes, 108 *Harv. L. Rev.* at 1361 (describing the color blind model of politics in the South as "among the great myths currently distorting public discussion").

CONCLUSION

For the reasons stated herein the judgment below should be reversed. To the extent that *Shaw v. Reno* and its progeny are inconsistent with that result, they should be reconsidered.

Respectfully submitted,

LAUGHLIN MCDONALD
Counsel of Record
NEIL BRADLEY
MAHA ZAKI
CRISTINA CORREIA
American Civil Liberties
Union Foundation
44 Forsyth Street
Suite 202
Atlanta, GA 30303
(404) 523-2721

STEVEN R. SHAPIRO
American Civil Liberties
Union Foundation
125 Broad Street
New York, NY 10004
(212) 549-2500

Counsel for Amicus Curiae

(12)

Supreme Court, U.S.
FILED
NOV 10 1998
CLERK

No. 98-85

In The

Supreme Court of the United States

October Term, 1998

JAMES B. HUNT, JR., in his official capacity as Governor of the State of North Carolina, *et al.*,

Appellants,

v.

MARTIN CROMARTIE, *et al.*,

Appellees.

On Appeal From The United States District Court For The Eastern District Of North Carolina

BRIEF *AMICUS CURIAE* OF THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW IN SUPPORT OF APPELLANTS

MATTHEW J. ZINN
(*Counsel of Record*)
DAVID A. STEIN
STEPTOE & JOHNSON LLP
1330 Connecticut Avenue, N.W.
Washington, D.C. 20036
202-429-3000

JAMES U. BLACKSHER
Title Bldg., Suite 710
300 21st Street North
Birmingham AL 35203
205-591-7238

JACK W. LONDEN, Co-Chair
DANIEL F. KOLB, Co-Chair
NORMAN REDLICH, Trustee
BARBARA R. ARNWINE
THOMAS J. HENDERSON
EDWARD STILL
GILDA R. WILLIAMS
LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW
1450 G Street, N.W., Suite 400
Washington, D.C. 20005
202-662-8600
Attorneys for Amicus Curiae Lawyers' Committee for Civil Rights Under Law

November 10, 1998

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

32 pp

TABLE OF CONTENTS

Page

INTEREST OF THE *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT..... 2

ARGUMENT 5

I. The Summary Judgment Entered Below Is Erroneous by Any Standard, and It Dramatizes the Need for Clarification and Principled Limitation of the *Shaw v. Reno* Jurisprudence..... 5

II. If the Court Were to Affirm the District Court's Entry of Summary Judgment in this Case, the Result Would Be an Unjustifiable Increase in the Number of *Shaw v. Reno* Type Equal Protection Cases Brought Before this Court 21

III. Even if the District Court Was Correct in Finding Race to be the Predominant Factor, the Court Erred by Granting Summary Judgment in Favor of Plaintiff-Appellees Without First Undertaking the Required Strict Scrutiny Analysis..... 23

CONCLUSION 27

TABLE OF AUTHORITIES

Page

CASES

Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995) 23

Addy v. Newton County, 2 F.Supp.2d 861 (S.D. Miss. 1997) 25

Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252 (1976) 9, 11, 12, 13

Bush v. Vera, 517 U.S. 952 (1996), *Clark v. Calhoun County*, 88 F.3d 1393 (5th Cir. 1996) ..... *passim*

Clark v. Roemer, 500 U.S. 646 (1991) 1, 25

Clinton v. Smith, 488 U.S. 988 (1988) 1

DeWitt v. Wilson, 856 F.Supp. 1409 (E.D. Cal. 1994), *aff'd summarily in part and dismissed in part*, 515 U.S. 1170 (1995) 20

Johnson v. Miller, 922 F.Supp. 1556 (S.D. Ga. 1995), *aff'd*, 117 S.Ct. 1925 (1997) 19

King v. State Bd. of Elections, 979 F.Supp. 619 (N.D. Ill. 1997), *aff'd without opinion*, 118 S.Ct. 877 (1998) 25

Lawyer v. Department of Justice, 117 S.Ct. 2186 (1997) 1

Miller v. Johnson, 515 U.S. 900 (1995) ... 1, 9, 11, 19, 22, 23

Mobile v. Bolden, 446 U.S. 55 (1980) 2

Morse v. Republican Party of Virginia, 517 U.S. 186 (1996) 8

TABLE OF AUTHORITIES – Continued

Page

Reno v. Bossier Parish School Board, 117 S.Ct. 1491 (1997) 1

Sanchez v. Colorado, 97 F.3d 1303 (10th Cir. 1996), *cert. denied*, 117 S.Ct. 1820 (1997) 25

Shaw v. Hunt, 517 U.S. 899 (1996) 1, 5, 18, 22, 23

Shaw v. Reno, 509 U.S. 630 (1993) ..... *passim*

Thornburg v. Gingles, 478 U.S. 30 (1986) 2, 24

United States v. Hays, 515 U.S. 737 (1995) 1

Voinovich v. Quilter, 507 U.S. 146 (1993) 24

Washington v. Davis, 426 U.S. 229 (1976) 9

Wright v. Rockefeller, 376 U.S. 52 (1964) 10

Young v. Fordice, 117 S.Ct. 1228 (1997) 1

ARTICLES AND BOOKS:

Charles S. Bullock III & Mark J. Rozell, *Southern Politics at Century's End*, in THE NEW POLITICS OF THE OLD SOUTH: AN INTRODUCTION TO SOUTHERN POLITICS (Charles S. Bullock, III & Mark J. Rozell, eds., 1998) 16, 17

KEITH J. BYBEE, MISTAKEN IDENTITY: THE SUPREME COURT AND THE POLITICS OF MINORITY REPRESENTATION (1998) 9

Thomas A. Kazee, *North Carolina: Conservatism, Traditionalism, and the GOP*, in THE NEW POLITICS OF THE OLD SOUTH: AN INTRODUCTION TO SOUTHERN POLITICS (Charles S. Bullock, III & Mark J. Rozell, eds., 1998) 16

TABLE OF AUTHORITIES – Continued

Page

David Lublin & D. Stephen Voss, *The Partisan Impact of Voting Rights Law: A Reply to Pamela S. Karlan*, 50 STAN. L. REV. 765 (1998) 14, 26

Richard H. Pildes & Richard G. Niemi, *Expressive Harms, "Bizarre Districts," and Voting Rights: Evaluating Election-District Appearances After Shaw v. Reno*, 92 MICH. L. REV. 483 (1993) 18, 19

WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (G. & C. Merriam 1981) 11

BRIEF *AMICUS CURIAE* OF THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW IN SUPPORT OF APPELLANTS

This brief in support of appellants is submitted with the written consent of counsel for all parties filed with the Clerk of the Court.[1]

INTEREST OF THE *AMICUS CURIAE*

The Lawyers' Committee is a non-profit organization created in 1963 at the request of the President of the United States to involve private attorneys throughout the country in the national effort to assure equal rights to all Americans. Protection of the voting rights of citizens has been an important aspect of the work of the Committee. The Committee has provided legal representation to litigants in numerous voting rights cases throughout the nation over the last 35 years, including cases before this Court, *see, e.g., Lawyer v. Department of Justice*, 117 S.Ct. 2186 (1997); *Reno v. Bossier Parish School Board*, 117 S.Ct. 1491 (1997); *Young v. Fordice*, 117 S.Ct. 1228 (1997); *United States v. Hays*, 515 U.S. 737 (1995); *Clark v. Roemer*, 500 U.S. 646 (1991); and *Clinton v. Smith*, 488 U.S. 988 (1988). The Committee has also participated as *amicus curiae* in other significant voting rights cases in this Court, *see, e.g., Shaw v. Hunt*, 517 U.S. 899 (1996); *Miller v. Johnson*, 515 U.S. 900

[1] This brief was not authored in whole or in part by counsel for a party to this proceeding, and no person or entity, other than the *amicus curiae*, its members, or its counsel, made a monetary contribution to the preparation or submission of this brief.

(1995); *Shaw v. Reno*, 509 U.S. 630 (1993); *Thornburg v. Gingles*, 478 U.S. 30 (1986); and *Mobile v. Bolden*, 446 U.S. 55 (1980).

SUMMARY OF ARGUMENT

The saga of North Carolina's District 12 returns to this Court for the third time because a second district court granted summary judgment for plaintiff-appellees on their equal protection challenge to the redrawn District 12 (previously approved by a different three-judge court). In deciding this case on summary judgment, the majority below committed serious and patent error.

The threshold inquiry in a redistricting case such as this is whether race was *the predominant* factor motivating the legislature's redistricting decision. This is a very demanding inquiry, and the party challenging the redistricting plan bears the burden of proof on this issue. Such a party must establish that the legislature's predominant or controlling motivation or intent in constructing the challenged district was a racial classification; that is, an unjustified, stereotypical reliance on the race of residents must have been the factor that predominated over the totality of all of the other factors influencing the legislature's redistricting decision.

Under the racial predominance test, plaintiffs must prove that boundary lines were drawn intentionally and predominantly to include or exclude residents based on their racial or ethnic characteristics. In addition, properly applied, the racial predominance test requires plaintiffs to demonstrate convincingly that reliance on race does not

reflect the redistricting choices and political communities of the voters themselves, but rests on unjustified and unwanted stereotypes regarding their race. Unless the principles of *Shaw v. Reno* and its progeny are clarified, they will be interpreted in a manner that subverts the constitutionally guaranteed freedom of political association and expression of black citizens.

Under this standard, the existence of evidence or inferences tending to show that racial demographics may not have been the predominant factor motivating the legislature's redistricting decision or that the disputed districts reflect actual political communities of interest shared by members of the same racial or ethnic group, should preclude the entry of summary judgment. As long as traditional districting criteria were not entirely neglected and factors other than impermissible racial considerations motivated the legislature, a redistricting decision should not be invalidated on summary judgment as violating equal protection.

In this case, there was more than ample evidence to preclude the entry of summary judgment. This evidence included affidavits from two State legislators intimately involved in crafting the redistricting plan and from numerous expert witnesses. The affidavits raised genuine issues of material fact regarding the legislature's predominant motivation and the relative importance of race in the redistricting decision. Specifically, the record indicated that race was *not* or, at a minimum, may not have been the predominant factor motivating the legislature's decision and that, based on election returns, black voters in District 12 are a part of a strongly cohesive political

community. The district court majority wrongly disregarded most of this evidence. For example, the district court majority relied upon voter registration data to support summary judgment, but ignored evidence that the State had relied upon actual election results, an alternative and more reliable measure of party allegiance, in redrawing District 12. This evidence, and other evidence of a similar nature, should have been evaluated by the court below sitting as a trier of fact.

If this Court were to affirm the district court's judgment in this case, such a decision would likely increase the number of unjustifiable redistricting equal protection challenges brought before this Court and the district courts, and afford an opportunity for some to seek invidious outcomes by filing similar suits. Moreover, the use of summary judgment to adjudicate these types of cases in the district courts will result in more cases appealed directly to this Court on incomplete records, frustrating this Court's ability to apply and shape the law and resulting in inefficient and wasteful litigation.

Finally, even if race is the predominant factor motivating the legislature's decision, a party challenging the redistricting plan still cannot prevail unless the State is unable to satisfy strict scrutiny by demonstrating that such use of race was narrowly tailored to serve a compelling state interest. Strict scrutiny is not a hollow inquiry. Rather, it gives States a realistic opportunity to demonstrate compliance with the Equal Protection Clause, while avoiding liability under section 2 of the Voting Rights Act. Here, the district court majority erroneously and inexplicably failed even to apply the strict scrutiny prong of the equal protection inquiry and, for that reason as

well, its order granting summary judgment must be reversed.

ARGUMENT

I. The Summary Judgment Entered Below Is Erroneous by Any Standard, and It Dramatizes the Need for Clarification and Principled Limitation of the *Shaw v. Reno* Jurisprudence.

In this case, for the third time in just over five years, this Court has been called upon to consider an equal protection challenge to the creation of North Carolina's Congressional District 12. *See Shaw v. Hunt*, 517 U.S. 899 (1996) (*Shaw II*); *Shaw v. Reno*, 509 U.S. 630 (1993) (*Shaw I*). This most recent installment of the District 12 controversy arises because a divided panel of the district court granted summary judgment for plaintiff-appellees who alleged that the redrawn District 12 violates the Equal Protection Clause of the Fourteenth Amendment. The grant of summary judgment here was in error because it employs such an overbroad predominant racial motivation standard that it effectively transforms legitimate political considerations into constitutionally suspect racial classifications wherever there is a correlation between race and the freely formed political associations of citizens themselves.[2]

---

[2] While we continue to believe the *Shaw* line of cases creates a species of constitutional violation lacking a requisite injury, we argue here that the district court failed correctly and fully to apply the standard enunciated in those cases.

The summary judgment in the instant action dramatically illustrates the problems posed by the erroneous application of the *Shaw* standards. The district court majority below did not require plaintiffs to prove that the plan's drafters were imposing "unjustified racial classifications," *Bush v. Vera*, 517 U.S. 952, 980 (1996), that is, stereotypical racial assumptions that all black voters "think alike, share the same political interests, and will prefer the same candidates at the polls," *Shaw I*, 509 U.S. at 647. Nor did the district court consider whether black voters in District 12 had freely associated to assert political influence and give expression to shared views through a representative in Congress, whether through formal party institutions or otherwise. On this record, it is plain that plaintiffs were not entitled to summary judgment on the issue of racial predominance. "If district lines merely correlate with race because they are drawn on the basis of political affiliation, which correlates with race, there is no racial classification to justify. . . . " *Bush*, 517 U.S. at 968.[3]

Thus, when applying the racial predominance test, the courts should consider whether apparent reliance on race constituted an unjustified and potentially demeaning

---

[3] The State argues that its drafters considered the wishes of black and white voters of District 12 only indirectly by determining that they had voted for Democratic candidates in the past. While this evidence is responsive, further evidence of the wishes of those voters is clearly relevant. This Court should clarify the meaning of its precedents to prevent both the lower courts and the parties in those courts from failing to give full regard to the constitutionally protected political rights of all citizens.

racial classification, or whether it reflected the recognition of a voluntary affiliation of persons, substantially of a particular racial background, who in fact view themselves as members of a distinct political community.

> If the State's goal is otherwise constitutional political gerrymandering, it is free to use the kind of political data on which Justice Stevens focuses – precinct general election voting patterns, precinct primary voting patterns, and legislators' experience – to achieve that goal regardless of its awareness of its racial implications and regardless of the fact that it does so in the context of a majority-minority district. To the extent that the District Court suggested the contrary, it erred. But to the extent that race is used as a proxy for political characteristics, a racial stereotype requiring strict scrutiny is in operation.

Id. (citations omitted).

In the instant case the district court majority, on summary judgment, rejected evidence that District 12's lines could be explained on the basis of partisan Democratic Party affiliation, and did not even address the extent to which race or ethnicity correlates with a common political affiliation in District 12. The unavoidable implication of its summary disposition is that the district court misapprehended this Court's *Shaw* jurisprudence as erecting a constitutional impediment to political affiliation and concerted action by black voters. Such a rule would serve to deny to black citizens constitutionally guaranteed freedoms of political association and expression – the opportunity to organize and seek representation of common political concerns among themselves and

in coalitions that unite persons of different races or transcend race – and it would do so on the impermissible basis of the race of those with whom they associate politically. Clearly this Court has laid down no such rule.

The *Shaw* jurisprudence is aimed at preventing state actors from drawing district lines that, *based on arbitrary stereotypes*, "convey the message that political identity is, or should be, predominantly racial." *Bush*, 517 U.S. at 980. It is being misinterpreted, however, as judicial authority to interfere with the rights of American citizens to form political identities themselves. Just as party conventions should be thought of as a "state-created framework" for the "exercise of private political rights," *Morse v. Republican Party of Virginia*, 517 U.S. 186, 271-72 (1996) (Thomas, J., dissenting), so should legislative redistricting be thought of as the exercise of the private political rights of the citizens, acting through the many voluntary political associations which constitute the body politic, to agree on the new shape of their democratic compact. This Court should stand guard equally against the unjustified aggregation of African Americans (and other racial and ethnic minorities) and against the interference with the freedom of citizens of minority racial or ethnic communities to choose to associate with each other and with others to give expression to common political values and interests.[4]

[4] A recent scholarly work makes the same point by "suggest[ing] a standard for gauging judicial intervention: if our government is to remain democratic, then the Court must not speak for the people in a way that prevents the people from finally speaking for themselves." KEITH J. BYBEE, MISTAKEN IDENTITY: THE SUPREME COURT AND THE POLITICS OF MINORITY REPRESENTATION 49 (1998).

This Court should reemphasize that the threshold task of demonstrating a predominantly racial purpose which justifies judicial scrutiny of legislative redistricting is "demanding." *See Miller v. Johnson*, 515 U.S. 900, 928 (O'Connor, J., concurring). It should not be enough to show that some lines were drawn purposefully to include or to exclude persons with particular racial or ethnic characteristics. In addition, the greatest care should be taken to ensure that *Shaw* and its progeny are applied to invalidate only racial groupings which constitute impermissible, stereotypical racial classifications, and not to redistricting plans which represent a legitimate recognition of defined political interests substantially shared among members of particular racial or ethnic communities. Plaintiffs should be required to show that legislators or plan-makers did not act on the basis of demonstrable *political* communities of interest, but instead merely assumed that persons with the same racial or ethnic backgrounds share the same political interests.

The district court displayed its fundamental misunderstanding of the *Shaw* racial predominance standard by citing *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1976), and *Washington v. Davis*, 426 U.S. 229 (1976), to support its summary conclusion that a legislative intent to segregate voters was "unexplainable on grounds other than race." J.S.App. 15a (*quoting Arlington Heights*, 429 U.S. at 266). These equal

protection precedents pertain to *discrimination* on the basis of race, an actual injury or disadvantage suffered by the individual plaintiffs. This is the crucial constitutional inquiry the district court never made. As this Court held in *Wright v. Rockefeller*, 376 U.S. 52 (1964), segregation of voters on the basis of race or ethnicity violates the Equal Protection Clause only if it *discriminates* against those voters by minimizing their collective voting strength or by manipulating or stereotyping them in a way that ignores their free and voluntary political interests in the redistricting context.

> It is plain to us that the District Court was not compelled to find that these districts were the product of a state contrivance to *discriminate* against colored or Puerto Rican voters. As the majority below pointed out, the concentration of colored and Puerto Rican voters in one area in the county made it difficult, even assuming it to be permissible, to fix districts so as to have anything like an equal division of these voters among the districts. Undoubtedly some of these voters, as shown by this lawsuit, would prefer a more even distribution of minority groups among the four congressional districts, but others, like the intervenors in this case, would argue strenuously that the kind of districts for which appellants contended would be undesirable and, because based on race or place of origin, would themselves be unconstitutional.

376 U.S. at 57-58 (emphasis added) (footnote omitted). Moreover, the *Shaw* racial predominance standard is more exacting than the standard applied in most equal protection cases, where it is sufficient to prove that a discriminatory purpose was "a motivating factor in the decision."

Arlington Heights, 429 U.S. at 265-66. The word "predominant" means "holding an ascendancy," or "having superior strength, influence, authority or position." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (G. & C. Merriam 1981). Thus, for a redistricting decision to be subject to strict scrutiny, not only must plaintiffs prove that race held a position of superior strength, influence, authority, or position over all of the other factors collectively motivating the legislature in that decision, they must prove that such a reliance on the race of voters discriminatorily classified them in ways which conflict with their freely expressed, voluntary political identities.

Ascertaining the legislature's predominant motivation or intent is no mean task. The district court must undertake a "searching" and "sensitive" inquiry into the evidence, recognizing the "complex interplay of forces that enter into a legislature's redistricting calculus," to determine whether race was, in fact, the predominant factor in a redistricting decision and whether the use of race impermissibly discriminated against plaintiffs, stereotypically or otherwise. *Bush*, 517 U.S. at 958; *Miller*, 515 U.S. at 916-17; *see also Arlington Heights*, 429 U.S. at 266. When a redistricting decision stems from "mixed motive[s]" – that is, when traditional districting criteria are "not *entirely* neglected" – a "careful review" is necessary to determine whether the legislature, in its redistricting calculus, made race the predominant factor over all of the other motives. *See Bush*, 517 U.S. at 959, 963 (emphasis in original). In this review, "the good faith of a state legislature must be presumed." *Miller*, 515 U.S. at 915. In this corner of the political thicket, courts must be ever

vigilant not to upset the delicate balance between constitutional protection of the individual from arbitrary and discriminatory treatment by the government and the equally compelling constitutional guarantee of freedom of association. In every redistricting plan reviewed by the Lawyers' Committee in its long experience working on voting rights issues, it has never found race, or any other single factor, to be the legislature's *sole* motivating factor, but has observed that legislative redistricting actions are always informed by a variety of different motives.[5] It is only the relative importance of the various motives that varies from case to case.

Because of the high complexity and sensitivity of the racial predominance test, summary judgment should not be granted to plaintiffs in a *Shaw v. Reno* type action unless there is no dispute as to the impermissible use of race. For purposes of deciding a plaintiff's motion for summary judgment in a case such as this, evidence or inferences tending to show that race may not have been an impermissibly predominant factor motivating the legislature's redistricting decision should be sufficient to defeat such a motion. Certainly, where the evidence shows only that the race of residents is correlated with some of the District's boundaries, as in the instant case, the plaintiffs' and the district court's task has only begun, and a summary conclusion of unconstitutionality cannot be justified.

---

[5] It is exceedingly rare, in any case, for a legislature to make decisions motivated by a single concern. *See Arlington Heights*, 429 U.S. at 265.

In racial equal protection cases that do not involve redistricting, a detailed review of the history of the legislation and even testimony from legislators may be necessary to discern legislative intent. *Arlington Heights*, 429 U.S. at 267-68. If that level of factual inquiry is required in cases where the plaintiff must prove only that race was *"a* motivating factor in the decision," *id.* at 265-66 (emphasis added), the factual inquiry into legislative motivation or intent is required to be even more painstaking and deliberate in a case where the plaintiff must demonstrate that race was *"the predominant* factor motivating the legislature's [redistricting] decision[,]" not simply *"a* motivating factor." *Bush*, 517 U.S. at 959 (emphasis in original). According to the plurality in *Bush*, the required review in a case such as this one must take into account "evidence regarding the redistricting plan's respect for traditional districting principles, the legislators' expressed motivations, and the methods used in the districting process." 517 U.S. at 959. By granting summary judgment below, the district court largely dispensed with this review.

The record here contains more than enough evidence for a trier of fact to find that the legislature was motivated predominantly by factors other than race and that traditional districting criteria, including respect for demonstrated *political* communities of interest, were not entirely disregarded in the redistricting legislation. Two key committee chairmen stated emphatically that race was *not* the predominant factor in the redistricting decision. The respective Chairmen of the Redistricting Committees of the North Carolina Senate and House of Representatives, Roy A. Cooper, III, a Democrat, and W.

Edwin McMahan, a Republican, submitted affidavits discussing the principal factors that motivated the legislature in designing the redistricting plan. J.S.App. 69a, 79a. The two legislators agreed that the goals of the redistricting legislation were, first, to cure the constitutional defects in the prior plan by assuring that race was not the predominant factor in constructing the plan and that traditional redistricting criteria were not subordinated to race and, second, to maintain the existing partisan balance in the State's congressional delegation and to protect incumbents. J.S.App. 72a-73a, 81a.[6] Senator Cooper and Representative McMahan acknowledged that race was considered in developing the plan, but testified that it was not the dominant or controlling purpose. J.S.App. 77a, 83a. In fact, Professors Lublin and Voss have independently observed that the legislative record in North Carolina "shows that incumbency was a major factor in the construction of new districts and that legislators were keenly aware of the constraints they faced in attempting to draw a constitutional plan." David Lublin & D. Stephen Voss, *The Partisan Impact of Voting Rights Law: A Reply to Pamela S. Karlan*, 50 STAN. L. REV. 765, 774 (1998) (hereinafter "Lublin & Voss"). This record was, for all practical purposes, ignored by district court majority.

---

[6] Senator Cooper noted in his affidavit that the boundaries of District 12 had to be drawn to avoid placing the residences of two sitting congressmen within the District and to exclude from the District the home county of a third congressman. J.S.App. 75a. This evidence, ignored by the majority in the district court but credited by the dissenting judge, J.S.App. 37a, suggests that "incumbency protection might explain as well as, or better than, race" the North Carolina legislature's decision to design District 12 the way that it did. *See Bush*, 517 U.S. at 967.

The North Carolina legislators also testified that "election results" were the principal analytical tool used to configure the districts in a way that preserved the partisan balance. J.S.App. 73a, 81a-82a. Senator Cooper stated that "partisan election data, not race, was the predominant basis for assigning precincts to districts," including District 12, and that the inclusion of precincts having significant black populations in District 12 was "simply the result of a strong Democratic voting pattern among blacks." J.S.App. 77a. Assuming the veracity of this testimony, as the district court should have done on summary judgment, use of such election data in this manner for crafting legislative districts plainly does not implicate race as the predominant factor in the redistricting plan. A correlation between race and political affiliation does not convert a permissible political gerrymander into an unconstitutional racial gerrymander. *See Bush*, 517 U.S. at 968. This is so whether the political cohesion of black voters demonstrated in the election returns accurately characterizes them as loyal Democrats or simply as politically unified voters.

The district court majority disregarded this evidence of reliance on actual voting data from actual elections – that is, evidence of how voters themselves reveal their political identities, and relied instead on different data showing that certain areas with heavy Democratic registration and a higher percentage of white voters were excluded from District 12. J.S.App. 8a-9a, 20a-21a. In doing so, the majority below impermissibly weighed the probative value of conflicting evidence, something it may not do on summary judgment. There is a genuine issue of fact in this case as to whether the State's reliance on

election results from actual elections is any less valid than the district court majority's reliance on voter registration data. By disregarding the State's evidence on this point, the district court majority, in effect, treated the use of election results as tantamount to a constitutionally impermissible form of race-conscious decision-making, rather than as a more reliable method of measuring political party strength and loyalty, and, more importantly, as evidence of the real political community of interests in District 12 with which black voters have chosen to associate themselves.

Party registration, party identification, and electoral support for candidates are all legitimate indicators of party strength. Yet, one study recently indicated that, in North Carolina, "the success of a party's candidates is the best measure of party vitality." *See* Thomas A. Kazee, *North Carolina: Conservatism, Traditionalism, and the GOP*, in THE NEW POLITICS OF THE OLD SOUTH: AN INTRODUCTION TO SOUTHERN POLITICS 152 (Charles S. Bullock, III & Mark J. Rozell, eds., 1998) (hereinafter "Kazee"). This conclusion follows from the fact that voter registration data does not take into account voters who do not always cast ballots for candidates from their registered party, whereas actual election results do reflect such party-line defections. *See* Kazee, *supra*, at 152 ("Ticket splitting and partisan defection make declarations of partisan affinity less valid measures of party strength"); *see also* J.S.App. 33a (dissenting opinion). In the South in particular, scholars have found that "Republican candidates have frequently run ahead of their party identification numbers[,]" and that white registered Democrats are more apt to vote for Republican candidates than black registered Democrats. *See* Charles

S. Bullock III & Mark J. Rozell, *Southern Politics at Century's End*, in THE NEW POLITICS OF THE OLD SOUTH: AN INTRODUCTION TO SOUTHERN POLITICS 10-11 (Charles S. Bullock, III & Mark J. Rozell, eds., 1998); *see also* Lublin & Voss, *supra*, at 769 ("National trends favoring the Republicans mainly affect white but not black voting behavior because African Americans are more loyal Democrats").

It was incumbent upon the district court to test the evidence of voter registration data on which it relied against the evidence of reliance upon actual election results proffered by the State defendants at trial. This latter evidence may have persuaded the district court, sitting as the finder of fact, to conclude that race was not the predominant factor in designing District 12, and plainly was of sufficient import to preclude the entry of summary judgment.

The uncontroverted testimony of the legislators regarding their motivations was buttressed by expert testimony to provide an empirical basis for confirming the express statements of legislative intent. Dr. David W. Peterson, a statistician, conducted a study to examine the boundary of District 12 and its relation to the racial and political makeup of residents of that District and the surrounding area. J.S.App. 85a. Dr. Peterson found that the boundary of District 12 "can be attributed to political considerations with at least as much statistical certainty as it can be attributed to racial considerations," and discerned "no statistical indication that race was the predominant factor" in determining that boundary. J.S.App. 87a. Thus, he concluded that "there is at least one other explanation that fits the data as well as or better than race, and that explanation is political identification." *Id.*

Dr. Gerald R. Webster, a professor of geography, evaluated North Carolina's 1998 redistricting plan in accordance with five traditional redistricting criteria and compared that plan with the 1992 plan found unconstitutional in *Shaw II*. J.S.App. 107a. For the two criteria most relevant to this type of equal protection case (the allocation of local government or electoral units to congressional districts and geographic compactness), Dr. Webster's study showed a marked improvement in the current plan. The 1998 plan reduced the number of the State's 100 counties divided among different congressional districts to 22, down from 44 in 1992, a 50 percent reduction. J.S.App. 116a, 133a. The 1998 plan also reduced the number of election precincts divided among different congressional districts from 80 (out of a total of 2,531 precincts) in 1992, to only 2 under the current plan. J.S.App. 117a.

Dr. Webster also evaluated District 12 specifically using the two mathematical compactness measures, dispersion and perimeter compactness, developed by Professors Richard Pildes and Richard Niemi.[7] *See* J.S.App. 120a-130a. For District 12, dispersion compactness increased from 0.045 in 1992 to 0.109 in 1998, an increase of 142.2 percent, while perimeter compactness increased from 0.014 in 1992 to 0.41 in 1998, an increase of 192.8 percent. J.S.App. 127a-128a, 143a, 145a. Although the 1998 figures would still be characterized as relatively

[7] Richard H. Pildes & Richard G. Niemi, *Expressive Harms, "Bizarre Districts," and Voting Rights: Evaluating Election-District Appearances After Shaw v. Reno*, 92 MICH. L. REV. 483, 553-75 (1993) (hereinafter "Pildes & Niemi").

"low" according to the Pildes & Niemi criteria,[8] that by itself does not indicate constitutional vulnerability under *Shaw I*, since geographic compactness is not a constitutional requirement. *See Bush*, 517 U.S. at 962; *Shaw I*, 509 U.S. at 647. Indeed, other congressional districts throughout the country have low compactness scores, J.S.App. 121a, and, in each State, some district must be the least compact. J.S.App. 36a (dissenting opinion). Moreover, these guidelines do not take into account travel time compactness or District 12's design around a major transportation corridor. J.S.App. 127a, 130a, 134a. Another expert witness, Dr. Alfred W. Stuart, testified that of the 12 congressional districts in North Carolina, the revised District 12 "has the third shortest travel time (1.67 hours) and the third shortest distance (95 miles) between its farthest points[,]" a marked improvement over the 1992 plan. J.S.App. 105a-106a. Further, District 12 is designed around a major transportation artery, Interstate 85, to link major urban areas sharing a community of interests. This very same interstate highway was described as "a very real connecting cable" linking "a palpable community of interests" along a corridor of urban, suburban, and rural areas in the Eleventh District of Georgia, as redesigned to comport with this Court's decision in *Miller*. *Johnson v. Miller*, 922 F.Supp. 1556, 1563-64 (S.D. Ga. 1995), *aff'd*, 117 S.Ct. 1925 (1997).[9]

[8] *See* Pildes & Niemi, *supra*, at 564-65.

[9] It is important to note that the challenged district is *not* a majority-minority district. (District 12's voting age population is approximately 43% black and 57% white. J.S.App. 30a-34a (dissenting opinion)). Nevertheless, there is no basis in law for applying different standards to evaluate majority-minority

Based on the totality of the evidence, the district court majority plainly erred in granting summary judgment in favor of plaintiff-appellees. The record below disclosed genuine issues of material fact concerning the role of race in the redistricting process relative to traditional districting criteria, such as party politics, the legislature's predominant motivation or intent, and the methods and data used to design the District. Most importantly, there was no evidence whatsoever that race was considered in a constitutionally impermissible way; to the contrary, actual election returns provide compelling evidence that black voters are included in a dependably cohesive political community of interest in District 12. All inferences from this evidence should have been drawn in favor of the non-moving party (here, the State proponents of the plan). In sum, where the record contains substantial evidence that race was not or may not have been the legislature's predominant motivation or intent in drawing the boundaries of the challenged district, summary judgment should not be granted for plaintiffs in a *Shaw v. Reno* type equal protection case.

---

districts, so-called "influence districts" in which blacks or Hispanics comprise a substantial minority of the voting population, and largely white-majority districts, nor should there be. *See Bush*, 517 U.S. at 958 (noting that strict scrutiny does not apply to "all cases of intentional creation of majority-minority districts"); *see also DeWitt v. Wilson*, 856 F.Supp. 1409 (E.D. Cal. 1994) (finding no basis for applying strict scrutiny to an intentionally created majority-minority district), *aff'd summarily in part and dismissed in part*, 515 U.S. 1170 (1995).

II. If the Court Were to Affirm the District Court's Entry of Summary Judgment in this Case, the Result Would Be an Unjustifiable Increase in the Number of *Shaw v. Reno* Type Equal Protection Cases Brought Before this Court

If the Court were to affirm the district court's entry of summary judgment here, the likely result would be an increase in the number of racial gerrymandering equal protection cases brought before this Court. Affirming the decision below would signal potential plaintiffs that the predominant factor test is not a major obstacle to succeeding in a *Shaw v. Reno* equal protection challenge. The message to potential plaintiffs would be that they can prevail, as a matter of law, even when the State presents substantial evidence indicating that race may not have been the predominant factor in its decision-making. Under this Court's precedents, plaintiffs must meet, and should be required to meet, a very demanding standard in order to prevail on the threshold question of the predominant factor motivating the legislature's decision. However, the practical effect of the decision below is to blur the distinction between the impermissible use of race as the "predominant" factor motivating the legislature's redistricting plan and the legitimate consideration of race as just one of a number of motivating factors. Any such blurring of this distinction will unjustifiably increase racial gerrymandering equal protection litigation.

In addition, sustaining the district court's entry of summary judgment for plaintiff-appellees here would afford those who have resisted the full enfranchisement of African Americans with a vehicle by which to assert equal protection challenges in an effort to dilute the

voting power of minorities and obtain a white supermajority in order to preclude the election of minority candidates or candidates responsive to minority interests. The Equal Protection Clause plainly was not enacted for the purpose of augmenting white majority voting power at the expense of minority voting power, and this Court should not sanction its use for such a purpose.

An increase in the number of challenges to redistricting plans in the district courts will inevitably increase the number of such cases this Court must address in some fashion, given the availability of direct appeal to this Court after adjudication of redistricting disputes by three-judge district courts. Moreover, given the sensitive and complex nature of the predominant factor inquiry, allowing district courts to grant summary judgment for plaintiffs in cases such as this will result in more appeals to this Court on partial and inadequate records. The absence of complete, fully vetted evidentiary records and detailed fact finding by the district courts in redistricting equal protection cases will make this Court's job on review more difficult, increase the number of reversals on technical or procedural grounds, rather than on the merits, and increase the number of times the same cases return to this Court.[10] The instant proceeding is a case in point. It is here all too clear that disposition by summary judgment does not promote judicial efficiency, but, quite to the contrary, is a prescription for repetitive and wasteful litigation both in this Court and in district courts.

[10] This Court's review in *Bush*, *Shaw II*, and *Miller* was based on the fully developed evidentiary records compiled at the district court level.

III. Even if the District Court Was Correct in Finding Race to be the Predominant Factor, the Court Erred by Granting Summary Judgment in Favor of Plaintiff-Appellees Without First Undertaking the Required Strict Scrutiny Analysis

If a district court finds that race was the predominant factor motivating the legislature's redistricting decision and that the legislature subordinated traditional districting criteria to race, that is not the end of the equal protection inquiry. Such a finding merely triggers strict scrutiny. Once strict scrutiny is deemed to apply, the State must be given the opportunity to show that redistricting legislation is narrowly tailored to serve a compelling state interest. *Bush*, 517 U.S. at 976; *Miller*, 515 U.S. at 920; *Shaw II*, 517 U.S. at 908; *Shaw I*, 509 U.S. at 658.

By skipping the second prong of the equal protection analysis mandated by this Court, the district court impermissibly treated strict scrutiny as "strict in theory, but fatal in fact." *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 237 (1995) (citation omitted). This was error because circumstances can and do exist in which a race-conscious remedy is narrowly tailored to further a compelling state interest. For instance, five Justices have expressed the view that compliance with section 2 of the Voting Rights Act is a compelling state interest,[11] and that section 2 is violated if, based on the totality of circumstances, members of a minority group have less opportunity than

[11] *Bush*, 517 U.S. at 990-92 (O'Connor, J., concurring); *id.* at 1033 (Stevens, J., joined by Ginsburg and Breyer, J.J., dissenting); *id.* at 1046 (Souter, J., joined by Ginsburg and Breyer, J.J., dissenting).

others to participate in the political process and to elect representatives of their choice. *See* 42 U.S.C. § 1973(b).

Thus, a district may withstand a constitutional challenge even if race was the predominant factor motivating the legislature and strict scrutiny is triggered. In order to satisfy strict scrutiny, a State may demonstrate a compelling state interest by showing that there is a "strong basis in evidence" for concluding that section 2 liability exists or that the potential for such liability may exist. *Bush*, 517 U.S. at 977 (citation omitted). A State's predominant reliance on race-conscious districting is narrowly tailored to serve a compelling interest if it "substantially addresses the § 2 violation," and if traditional districting principles are not subordinated to race "substantially more than is 'reasonably necessary' to avoid § 2 liability." *Id.* at 977, 979 (citations omitted).[12] Further, a district designed to comply with section 2 need not have "the least possible amount of irregularity in shape," and may pass strict scrutiny without winning "beauty contests" against rival districts designed by plaintiffs' experts. *Id.* at 977.

---

[12] The first precondition for liability under section 2 under *Thornburg v. Gingles*, 478 U.S. 30, 50-51 (1986), focuses on the existence of a sufficient minority population to justify the creation of majority-minority districts. Here, of course, the challenged District 12 is not a majority-minority district, since only 43% of the voting age population of the District is black, while 57% is white. J.S.App. 30a-34a. However, in *Voinovich v. Quilter*, 507 U.S. 146, 154 (1993), this Court left open the possibility that minority voters could state a viable section 2 claim if a redistricting plan deprived them of "influence districts" in which they constitute a substantial (and thus supposedly influential) minority.

Relying on this Court's recent decisions on strict scrutiny, most lower courts have treated the strict scrutiny analysis as an integral part of the equal protection inquiry in redistricting cases. The Fifth and Tenth Circuits have each addressed how the strict scrutiny prong of the equal protection analysis preserves the availability of race-conscious remedies under section 2 of the Voting Rights Act. *Sanchez v. Colorado*, 97 F.3d 1303, 1326-29 (10th Cir. 1996), *cert. denied*, 117 S.Ct. 1820 (1997); *Clark v. Calhoun County*, 88 F.3d 1393, 1402-08 (5th Cir. 1996). In each of these cases, the court echoed the majority of Justices who have indicated that compliance with section 2 constitutes a compelling state interest and noted that districts drawn predominantly on the basis of race will be narrowly tailored if race overrides traditional districting principles no more than is reasonably necessary to remedy a section 2 violation. *Sanchez*, 97 F.3d at 1327; *Clark*, 88 F.3d at 1407-08. In at least two instances, district courts have held that a district designed with race as the predominant motivating factor nevertheless passed strict scrutiny because the legislature's action was narrowly tailored to remedy a section 2 violation. *Addy v. Newton County*, 2 F.Supp.2d 861 (S.D. Miss. 1997) (appeal pending); *King v. State Bd. of Elections*, 979 F.Supp. 619, 622-27 (N.D. Ill. 1997), *aff'd without opinion*, 118 S.Ct. 877 (1998).

The application of strict scrutiny in the equal protection redistricting context must not be construed as "fatal in fact" if the Court is to avoid a head-on collision between its equal protection redistricting jurisprudence and section 2 of the Voting Rights Act. The tension between these two bodies of law creates a dilemma for

state legislatures: if, on the one hand, a district is considered not sufficiently compact and the percentage of minority voters in the district is high, the district may be invalidated for using race as its predominant motivating factor; yet, if a substantial minority population is dispersed among different districts in relatively low proportions, such that minority voters do not have a fair opportunity to elect candidates of their choice, then those voters may well claim a violation of section 2. The strict scrutiny prong of the equal protection inquiry at least makes it possible for States to wend their way between "the Scylla of racial gerrymandering [as proscribed in *Shaw* and its progeny] . . . and the Charybdis of minority vote dilution" under section 2 of the Voting Rights Act. *See* Lublin & Voss, *supra*, at 773. Strict scrutiny must afford a meaningful opportunity for challenged districts to pass constitutional muster if States are to be able to design districts that comport both with the Equal Protection Clause and with section 2 of the Voting Rights Act. Eschewing this crucial step, as the district court majority did here, is unjustified as a matter of law and contrary to prudent judicial decision-making.

CONCLUSION

For the reasons stated above, the order of the district court below granting summary judgment in favor of plaintiff-appellees should be reversed and the case remanded for trial.

Respectfully submitted,

MATTHEW J. ZINN
(*Counsel of Record*)
DAVID A. STEIN
STEPTOE & JOHNSON LLP
1330 Connecticut Avenue, N.W.
Washington, D.C. 20036
202-429-3000

JACK W. LONDEN, Co-Chair
DANIEL F. KOLB, Co-Chair
NORMAN REDLICH, Trustee
BARBARA R. ARNWINE
THOMAS J. HENDERSON
EDWARD STILL
GILDA R. WILLIAMS
LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW
1450 G Street, N.W., Suite 400
Washington, D.C. 20005
202-662-8600

JAMES U. BLACKSHER
Title Bldg., Suite 710
300 21st Street North
Birmingham AL 35203
205-591-7238

Attorneys for Amicus Curiae Lawyers' Committee for Civil Rights Under Law

November 10, 1998

Supreme Court, U.S.
FILED
NOV 10 1998
CLERK

(13)

No. 98-85

In The

Supreme Court of the United States

October Term, 1998

JAMES B. HUNT, JR., in his official capacity as Governor of the State of North Carolina, *et al.*,

Appellants,

vs.

MARTIN CROMARTIE, *et al.*,

Appellees.

On Appeal from the United States District Court for the Eastern District of North Carolina

BRIEF OF *AMICI CURIAE* BRENNAN CENTER FOR JUSTICE AT NEW YORK UNIVERSITY SCHOOL OF LAW, ASIAN AMERICAN LEGAL DEFENSE AND EDUCATION FUND, AND PUERTO RICAN LEGAL DEFENSE AND EDUCATION FUND, INC. IN SUPPORT OF APPELLANTS

BURT NEUBORNE
Counsel of Record
DEBORAH GOLDBERG
RICHARD R. BUERY, JR.
BRENNAN CENTER FOR JUSTICE
at New York University School of Law
Attorneys for Amici Curiae
161 Avenue of the Americas
Fifth Floor
New York, New York 10013
(212) 998-6730

149584

Counsel Press LLC
FORMERLY LUTZ APPELLATE SERVICES
(800) 274-3321 • (800) 359-6859

37 pp

TABLE OF CONTENTS

	Page
Table of Contents	i
Table of Cited Authorities	iv
Interests of *Amici Curiae*	1
Introduction and Summary of Argument	2
Argument	5
I. Courts Deciding *Shaw* Claims Must Recognize Plaintiffs' Unusually "Demanding" Evidentiary Burden.	5
A. Claims of Unconstitutional Gerrymandering Under *Shaw* Require Proof That Race Was the "Dominant and Controlling" Consideration in Drawing District Lines.	5
B. *Shaw* Offers No Guidance to Courts Deciding Whether Plaintiffs Have Carried Their Burden.	6
C. If the Court Declines to Reconsider *Shaw*, the Court Should Provide a Workable Framework for *Shaw* Actions That Preserves Plaintiffs' Demanding Evidentiary Burden.	7

Contents

Page

1. The Court Should Impose a Demanding Production Burden Before Allowing District Courts to Infer a Predominantly Racial Purpose From Circumstantial Evidence. 9

   a. Plaintiffs Should Be Required to Present Compelling Evidence That a Challenged District Flunks Functional Test for Geographical Compactness. 10

   b. Plaintiffs Should Also Be Required to Present Compelling Evidence That a Challenged District Seriously Distorts the Region's Racial Demographics. 14

2. If Plaintiffs Satisfy Their Production Burden, Defendants Must Produce Evidence That Race Was Not the Predominant Motive, with Plaintiffs Retaining the Ultimate Burden of Proving Unconstitutionality. 14

3. When Plaintiffs Cannot Carry Their Burden of Proof, Courts Should Defer to the Legislature's Line-Drawing Judgments. 15

Contents

Page

II. The District Court Improperly Relieved Plaintiffs Of Their Demanding Burden Of Proof. 16

   A. Applying the Appropriate Framework, Plaintiffs Failed to Meet Their Substantial Burden of Demonstrating That Race Was North Carolina's Predominant Purpose in Redistricting. 17

      1. Plaintiffs' Circumstantial Evidence Failed Even to Raise an Inference of Discriminatory Purpose. 17

      2. Defendants Fully Rebutted Any Inference That Race Was the Predominant Factor in the Districting Process. 19

   B. The District Court Relieved Plaintiffs of Their Difficult Burden of Proof By Relying on Impact, Rather Than Intent, to Find a Constitutional Violation. 24

Conclusion 28

TABLE OF CITED AUTHORITIES

Cases: *Page*

Abrams v. Johnson, 117 S. Ct. 1925 (1997) 2, 8, 21, 23

Agosto v. INS, 436 U.S. 748 (1978) 27

Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986) 25, 26

Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252 (1977) 6

Baker v. Carr, 369 U.S. 186 (1962) 16

Bush v. Vera, 517 U.S. 952 (1996) 2, 5, 7, 13, 20, 22, 23

Celotex Corp. v. Catrett, 477 U.S. 317 (1986) 25

Chen v. City of Houston, 1998 U.S. Dist. LEXIS 9860 (S.D. Tex. 1998) 10

Colegrove v. Green, 328 U.S. 549 (1946). 16

Crawford-el v. Britton, 118 S. Ct. 1584 (1998) 25, 27

Cromartie v. Hunt, No. 4:96-CV-104-BO (3) (E.D.N.C. April 14, 1998) 17, 18, 21, 22, 23, 25

Davis v. Bandemer, 478 U.S. 109 (1986) 15, 16

DeWitt v. Wilson, 856 F. Supp. 1409 (E.D. Cal. 1994), *aff'd mem.*, 515 U.S. 1170 (1995) 10

Page

Eastman Kodak Co. v. Image Tech. Servs., Inc., 504 U.S. 451 (1992). 26

Gingles v. Edmisten, 590 F. Supp. 345 (E.D.N.C. 1984), *aff'd in part and rev'd in part sub nom., Thornburg v. Gingles*, 478 U.S. 30 (1986) 22

Gomillion v. Lightfoot, 364 U.S. 339 (1960) 6, 16, 24

Holder v. Hall, 512 U.S. 874 (1994) 15

Illinois v. Krull, 480 U.S. 340 (1987) 9

Johnson v. Meltzer, 134 F.3d 1393 (9th Cir. 1998) ... 27

Johnson v. Miller, 922 F. Supp. 1556 (S.D. Ga. 1995) 23

King v. State Bd. of Elections, 979 F. Supp. 619 (1997), *aff'd mem.*, 118 S. Ct. 877 (1998). 28

Lawyer v. Department of Justice, 117 S. Ct. 2186 (1997) 2, 5, 18, 23

Miller v. Johnson, 515 U.S. 900 (1995) 2, 5, 6, 7, 9, 14, 15, 20, 25, 26

Prosser v. Elections Bd., 793 F. Supp. 859 (1992) ... 11, 12

Reynolds v. Sims, 377 U.S. 533 (1964) 15

Table of Cited Authorities

	Page
Shaw v. Hunt, 517 U.S. 899 (1996)	2, 5, 6, 8, 16, 20
Shaw v. Reno, 509 U.S. 630 (1993)	*passim*
Thornburg v. Gingles, 478 U.S. 30 (1986)	16, 22
United States v. Hays, 515 U.S. 737 (1995).	2
Wesberry v. Sanders, 376 U.S. 1 (1964)	15
White Motor Co. v. United States, 372 U.S. 253 (1963)	27
Wilson v. Eu, 823 P.2d 545 (Cal. 1992)	10
Yick Wo v. Hopkins, 118 U.S. 356 (1886)	6
Rules:	
Fed. R. Civ. P. 56(e)	25
Supreme Court Rule 37.6	1
Other Authorities:	
T. Alexander Aleinikoff & Samuel Issacharoff, *Race and Redistricting: Drawing Constitutional Lines after* Shaw v. Reno, 92 Mich. L. Rev. 588 (1993)	12
Michael Barone & Grant Ujifusa, *The Almanac of American Politics 1998* (1998)	21

Table of Cited Authorities

	Page
Keith J. Bybee, *Mistaken Identity: The Supreme Court and the Politics of Minority Representation* (1998)	15
Bruce Cain, *The Reapportionment Puzzle* (1984)	11, 12, 13
Robert G. Dixon, Jr., *Fair Criteria and Procedures for Establishing Legislative Districts, in Representation and Redistricting Issues* (Bernard Grofman et al. eds., 1982)	16
Bernard Grofman, *Criteria for Districting: A Social Science Perspective*, 33 U.C.L.A. L. Rev. 77 (1985)	13
Paul A. Jargowsky, *Metropolitan Restructuring and Urban Policy*, 8 Stan. L. & Pol'y Rev. 47 (1997)	12
Steven A. Light, *Too (Color)Blind to See: The Voting Rights Act of 1965 and the Rehnquist Court*, 8 Geo. Mason U. Civ. Rts. L.J. 1 (1997)	11
Daniel H. Lowenstein & Jonathan Steinberg, *The Quest for Legislative Districting in the Public Interest: Elusive or Illusory?*, 33 U.C.L.A. L. Rev. 1 (1985)	13, 16
Stephen J. Malone, *Recognizing Communities of Interest in a Legislative Apportionment Plan*, 83 Va. L. Rev. 461 (1997)	11, 15

Table of Cited Authorities

	Page
Hanna Fenichel Pitkin, *The Concept of Representation* (1967)	15
Richard H. Pildes & Richard G. Niemi, *Expressive Harms, "Bizarre Districts," and Voting Rights: Evaluating Election-District Appearances After* Shaw v. Reno, 92 Mich. L. Rev. 483 (1993)	11
10B Wright, Miller & Kane, *Federal Practice & Procedure: Civil 3d* § 2730 (1998)	26

INTERESTS OF *AMICI CURIAE*

With the consent of the parties, the Brennan Center for Justice at New York University School of Law; the Asian American Legal Defense and Education Fund, Inc.; and the Puerto Rican Legal Defense and Education Fund, Inc. submit this brief *amici curiae* in support of Defendants-Appellants.[1] Letters of consent are on file with this Court.

The Brennan Center for Justice at New York University School of Law is a nonpartisan institute dedicated to a vision of inclusive and effective democracy. The Center unites the intellectual resources of the academy with the pragmatic expertise of the bar in an effort to assist both courts and legislatures in developing practical solutions to difficult problems in areas of special concern to Justice William Brennan, Jr. To that end, the Center has created a Democracy Program, which undertakes projects that promote equal representation and other core ideals of democratic government. The Center takes an interest in this case because of its implications for the effective representation of minority populations and submits this brief in the hope of providing a workable framework for deciding *Shaw* actions.

The Asian American Legal Defense and Education Fund ("AALDEF"), founded in 1974, is a nonprofit organization that protects the legal rights of Asian Americans. AALDEF has represented the Asian American community in numerous cases and administrative proceedings under the Voting Rights Act. The Court's decision in *Shaw v. Reno* has been interpreted in ways that have limited the rights of Asian Americans to

---

1. Pursuant to Supreme Court Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than *amici*, has contributed monetarily to the preparation and submission of this brief.

participate fully in the political process. The decision below is another clear example of how the distorting lens of *Shaw* has been used to depict the permissive consideration of communities of interest as the impermissible consideration of race. AALDEF takes an interest in this case because the continued viability of electoral participation is threatened by this misapplication of the Equal Protection Clause.

The Puerto Rican Legal Defense and Education Fund, Inc. ("PRLDEF") is a national civil rights organization that exists to ensure that every Puerto Rican as well as other Latinos are guaranteed equal opportunities to succeed. Through litigation, advocacy, and education, PRLDEF has initiated hundreds of cases to combat discrimination in significant areas such as voting, education, housing, and language rights. It is of paramount importance to PRLDEF that its constituency be afforded full access to the political process. PRLDEF takes an interest in this case because the district court's interpretation of *Shaw v. Reno*, if allowed to stand, threatens to deny PRLDEF's constituency the opportunity to participate fully and effectively in the political process by joining with non-Latinos in common communities of interest.

INTRODUCTION AND SUMMARY OF ARGUMENT

Under *Shaw v. Reno*, 509 U.S. 630 (1993) ("*Shaw I*"), and its progeny,[2] efforts to enhance the political power of racial minorities by using race as the dominant and controlling factor in creating "majority-minority" legislative districts violate the Equal Protection Clause of the Fourteenth Amendment. While

2. *See, e.g., Lawyer v. Department of Justice*, 117 S. Ct. 2186 (1997); *Abrams v. Johnson*, 117 S. Ct. 1925 (1997); *Bush v. Vera*, 517 U.S. 952 (1996) (plurality opinion); *Shaw v. Hunt*, 517 U.S. 899 (1996); *Miller v. Johnson*, 515 U.S. 900 (1995); *United States v. Hays*, 515 U.S. 737 (1995).

amici share the *Shaw I* Court's aspiration for a nation in which race does not play a divisive role, *amici* fear that *Shaw I* unfairly denies minority voters the opportunity to organize themselves as a community sharing actual interests in the real world of North Carolina politics.

Whatever the wisdom of *Shaw I*, however, this case goes far beyond outlawing race as a permissible community of interest. This case casts doubt on the ability of North Carolina to draw district lines that recognize *non-racial* communities of interest, such as those linked by political affiliation, inner-city residence, and proximity to transportation corridors, solely because in today's America those communities of interest often correlate with membership in a racial minority.

The district court below summarily invalidated a non-majority-minority congressional district, ignoring and mischaracterizing sworn assertions that its shape and racial composition were traceable not to an overriding concern with race but to a desire to recognize political affiliation, inner city residence, and residence in close proximity to a highway as legitimate non-racial communities of interest warranting representation in Congress. If the district court's decision is affirmed, minority voters will be doubly harmed. Not only will *Shaw I* deprive them of the ability to be linked by an immensely important community of interest — membership in a minority race — but, alone among American voters, they will be denied the ability to be linked by crucial non-racial communities of interest, merely because those interests often overlap with race. Surely, the Fourteenth and Fifteenth Amendments were not intended to create such a second-class political status.

To avoid this unfair and unintended consequence, this Court should reaffirm that *Shaw I* imposes an extremely demanding burden on plaintiffs claiming that a state has segregated voters

on the basis of race in violation of the Equal Protection Clause. Plaintiffs in a *Shaw I* action cannot rest on evidence that race was one of several motivating factors in choosing district lines but instead must prove that race for its own sake was the state's "dominant and controlling" rationale in drawing district lines before strict scrutiny will apply. *See* Point I.A.

In Point I.B., *amici* suggest that *Shaw I* and its progeny do not provide adequate guidance to courts attempting to apply this standard and should therefore be reconsidered. But in the event that the Court adheres to *Shaw I*, *amici* propose an analytical framework that would allow courts to decipher the legislature's predominant intent, while preserving *Shaw I*'s demanding burden of proof. *See* Point I.C.

Amici demonstrate in Point II that, under this framework, Plaintiffs could not carry their demanding burden. Plaintiffs' evidence of District Twelve's shape and racial composition was insufficient to establish even a *prima facie* case of liability. And even if Plaintiffs had raised an inference of impermissible racial intent, Defendants fully rebutted that inference with unchallenged proof that race was not the state's predominant consideration. That unrebutted evidence shows that North Carolina drew district boundaries with the hope of providing representation for actual communities of interest defined by voting patterns, inner-city residence, and proximity to Interstate 85. Inexplicably, the district court ignored or mischaracterized most of this evidence. *See* Point II.A.

Finally, as *amici* demonstrate in Point II.B., the district court erred in denying Defendants' motion for summary judgment and in granting Plaintiffs' motion for summary judgment. In so doing, the court effectively shifted the burden of persuasion to Defendants and transformed *Shaw I*'s intent

standard into a far less burdensome impact test. The Court should therefore reverse the decision below, or at the very least vacate and remand the case for fact-finding on the issue of intent and, if intent is proven, for application of strict scrutiny.

ARGUMENT

I.

COURTS DECIDING *SHAW* CLAIMS MUST RECOGNIZE PLAINTIFFS' UNUSUALLY "DEMANDING" EVIDENTIARY BURDEN.

A. Claims of Unconstitutional Gerrymandering Under *Shaw* Require Proof That Race Was the "Dominant and Controlling" Consideration in Drawing District Lines.

Plaintiffs in an action under *Shaw I* face an extremely "demanding" evidentiary burden. *Miller v. Johnson*, 515 U.S. 900, 928 (1995) (O'Connor, J., concurring). They cannot trigger strict scrutiny merely by showing that a racially discriminatory purpose was one factor in government decision-making. Rather, plaintiffs must show that race, standing alone, was the State's "dominant and controlling" consideration. *Shaw v. Hunt*, 517 U.S. 899, 905 (1996) ("*Shaw II*") (citations omitted); *see Miller*, 515 U.S. at 916 (plaintiffs must prove "race was the predominant factor . . . [by showing] that the legislature subordinated traditional race neutral districting principles, including but not limited to compactness, contiguity, respect for political subdivisions or communities defined by actual shared interests"); *Bush v. Vera*, 517 U.S. 952, 959 (1996) (plurality opinion).

Under this demanding standard, mere evidence of the racial impact of districting cannot sustain a *Shaw I* claim.[3] "In the rare

3. *See Lawyer v. Department of Justice*, 117 S. Ct. 2186, 2195 (1997) ("[W]e have never suggested that the percentage of black residents (Cont'd)

case," the effects of governmental action may be so overwhelming that the racial purpose of the action is clear. *Miller*, 515 U.S. at 913 (citing *Gomillion v. Lightfoot*, 364 U.S. 339 (1960), and *Yick Wo v. Hopkins*, 118 U.S. 356 (1886)). But "[i]n the absence of a pattern as stark as those in *Yick Wo* or *Gomillion*, 'impact alone is not determinative, and the Court must look to other evidence of race-based decisionmaking.' " *Miller*, 515 U.S. at 914 (quoting *Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 266 (1977)). That evidence must command the conclusion that the legislature elevated race above all other considerations in drawing a challenged district's lines.[4]

B. *Shaw* Offers No Guidance to Courts Deciding Whether Plaintiffs Have Carried Their Burden.

Legislatures drawing a district's lines, and courts reviewing apportionment challenges under *Shaw I*, need a standard that clearly specifies when race may be legitimately considered. Unfortunately, *Shaw I* and its progeny create an unstable legal standard in a context that cries out for predictability. On the one hand, states are permitted to redistrict "with consciousness

(Cont'd)
in a district may not exceed the percentage of black residents in any of the counties from which the district is created, and have never recognized similar racial composition of different political districts as being necessary to avoid an inference of racial gerrymandering . . . .").

4. In this regard, North Carolina's awareness that its districting program would place a substantial black minority in District Twelve does not render the district constitutionally suspect. *See Shaw* II, 517 U.S. at 905 ("[A] legislature may be conscious of the voters' races without using race as a basis for assigning voters to districts."); *Miller*, 515 U.S. at 916 ("Redistricting legislatures will . . . almost always be aware of racial demographics; but it does not follow that race predominates in the redistricting process.").

of race," *Vera*, 517 U.S. at 958 (plurality opinion); *Miller*, 515 U.S. at 916, and indeed must do so in order to avoid running afoul of the Voting Rights Act, *see Vera*, 517 U.S. at 991-92 (O'Connor, J., concurring). On the other hand, race may not be "the predominant factor motivating the legislature's decision." *Miller*, 515 U.S. at 916. Legislatures are therefore left with no practical guidance as to where to draw the line between permissible and impermissible uses of race.

For that reason alone, the *Shaw* line of cases should be reconsidered. The razor-thin distinctions between being aware of race, being motivated by race, and more importantly, being predominantly motivated by race, are so ephemeral that resolution of such questions may well be beyond the competence not only of legislatures but of courts. *See Miller*, 515 U.S. at 916 ("The distinction between being aware of racial considerations and being motivated by them may be difficult to make.").

Shaw I, therefore, places both state legislatures and district courts in a quandary. Without concrete guidance as to how and when race may be considered, and faced with significant pressure both to consider race and not to consider race, states may be forced to cede their redistricting responsibilities to the unpredictable fact-finding procedures of the federal courts. But the *Shaw* cases offer the courts no better idea about how to distinguish unconstitutional districts. For this reason, *amici* urge the Court to reconsider the continued propriety of *Shaw I*.

C. If the Court Declines to Reconsider *Shaw*, the Court Should Provide a Workable Framework for *Shaw* Actions That Preserves Plaintiffs' Demanding Evidentiary Burden.

Shaw I creates an unmanageable standard of liability, requiring a quixotic search for a "predominant" legislative

motive that may pose insuperable practical problems for conscientious fact-finders. If this Court remains committed to *Shaw I*, however, the Court must provide district courts with precise guidance as to how to resolve the difficult factual question of whether race was the controlling factor in drawing district lines. Moreover, to ensure that district courts do not simply presume unconstitutionality when faced with districts they consider "oddly shaped" or "too black," the framework this Court provides must preserve the demanding burden of proof imposed on *Shaw I* plaintiffs.

To achieve these ends, the Court might consider the following framework: In the absence of direct evidence that the state was predominantly motivated by race, plaintiffs would be required to provide compelling circumstantial evidence that the challenged district *both* flunked a functional compactness test *and* seriously distorted racial demographics in order to raise an inference that race dominated the districting process. If plaintiffs provided such powerful circumstantial evidence, the production burden would then shift to defendants to offer legitimate nondiscriminatory reasons for district boundaries. Defendants' production of sworn evidence that non-racial considerations dominated the districting process would shift the production burden back to plaintiffs. Whether plaintiffs were able to establish a *prima facie* case, or to rebut the state's evidence would, therefore, be questions of law for the court, since they would be questions about satisfaction of the production burden. At all times, the ultimate and demanding burden of persuasion on the issue of predominant racial purpose would remain with plaintiffs. *See Abrams v. Johnson*, 117 S. Ct. 1925, 1931 (1997); *Shaw II*, 517 U.S. at 905.

1. The Court Should Impose a Demanding Production Burden Before Allowing District Courts to Infer a Predominantly Racial Purpose From Circumstantial Evidence.

For three reasons, courts should require *Shaw I* plaintiffs to meet a demanding production burden before inferring a predominantly racial purpose from merely circumstantial evidence. First, this Court has already held that plaintiffs face a demanding burden of persuasion in *Shaw I* actions. Plaintiffs should therefore face a significant burden of production before an inference of unconstitutionality may be raised. *See Miller*, 515 U.S. at 916-17 (noting that plaintiffs' "evidentiary difficulty . . . requires courts to exercise extraordinary caution" before allowing *Shaw I* claims to go forward). Second, repeated judicial interference in congressional districting wreaks havoc on state democratic processes. Judges should demand clear evidence of a *Shaw I* violation before allowing a State to be dragged into court. *See id.* at 916-17 ("[C]ourts must . . . recognize . . . the intrusive potential of judicial intervention into the legislative realm, when assessing . . . the adequacy of a plaintiff's showing at the various stages of litigation and determining whether to permit discovery or trial to proceed."). Third, "the presumption of good faith that must be accorded legislative enactments" weighs in favor of imposing a substantial burden of production. *Id.* at 916; *see, e.g., Illinois v. Krull*, 480 U.S. 340, 351 (1987) (legislatures are presumed to act in accord with the Constitution).

In a *Shaw I* action, plaintiffs would carry their burden of production, and thereby raise an inference of racial gerrymandering, only if they satisfied two tests. First, plaintiffs would have to make a compelling showing that the challenged district failed a functional test for geographical compactness. Second, they would have to demonstrate that the racial

demographics of the district were seriously distorted by comparison with those of neighboring districts. The evidence would constitute a *prima facie* case under *Shaw I* if, left unrebutted, it would permit a reasonable fact-finder to conclude that the State completely subordinated race-neutral districting criteria to race. Whether the proffered evidence sufficed would be a question of law for the court.

a. Plaintiffs Should Be Required to Present Compelling Evidence That a Challenged District Flunks a Functional Test for Geographical Compactness.

As a threshold matter, *Shaw I* plaintiffs should be required to present compelling evidence that a challenged district fails a functional test for geographical compactness. Functional compactness is best understood as " 'the presence or absence of a sense of community made possible by open lines of access and communication.' " *DeWitt v. Wilson*, 856 F. Supp. 1409, 1413 (E.D. Cal. 1994) (quoting *Wilson v. Eu*, 823 P.2d 545, 549 (Cal. 1992)), *aff'd mem.*, 515 U.S. 1170 (1995); *see Chen v. City of Houston*, 1998 U.S. Dist. LEXIS 9860, *33, *36 (S.D. Tex. 1998) (same). A functional approach thus measures the geographical compactness of a district based on such relevant indicia as actual road travel-time across the district and the existence of open lines of access and communication — the things that actually foster communities of interest in a region and facilitate interaction between representatives and constituents.

The functional test generally makes more sense in contemporary times than the traditional aesthetic and physical measures reflected in tests for "dispersion" and "perimeter" compactness. Measures of dispersion and perimeter compactness rest on the notion that the perfect district is

aesthetically pleasing and has "a regular, simple shape, usually a circle," Richard H. Pildes & Richard G. Niemi, *Expressive Harms, "Bizarre Districts," and Voting Rights: Evaluating Election-District Appearances After* Shaw v. Reno, 92 Mich. L. Rev. 483, 554 (1993), and that people who live in close physical proximity are likely to share interests worthy of common representation, *see id.* at 501 ("A principal aim of territorial districting is to facilitate the representation and interests of political communities. Compact districting is at best a proxy for this goal . . . ."). When travel and communication over long distances were difficult, people who lived close to one another might well have been presumed to share common interests, and legislatures and courts might reasonably have assumed that the best way to ensure representation based on actual interests was to minimize physical distance between people in a single district. But in the modern world, "there is no necessary logical relation between [dispersion and perimeter] compactness" and the representation of shared interests. Bruce Cain, *The Reapportionment Puzzle* 43 (1984). Nor is there necessarily an empirical relationship between the two. *See id.* at 43-50; Steven A. Light, *Too (Color)Blind to See: The Voting Rights Act of 1965 and the Rehnquist Court*, 8 Geo. Mason U. Civ. Rts. L.J. 1, 34 (1997) (criticizing *Miller* for presuming that "physical proximity . . . is a legitimate proxy for real communities of interest").[5]

Indeed, strict adherence to physical proximity can be an impediment to providing representation to genuine communities

---

5. *See also Prosser v. Elections Bd.*, 793 F. Supp. 859, 863 (1992) (per curiam) (recognizing imperfect correlation between "geographical propinquity and community of interests"); Stephen J. Malone, *Recognizing Communities of Interest in a Legislative Apportionment Plan*, 83 Va. L. Rev. 461, 475 (1997) (describing "imperfect nexus between geographically compact districts and communities of interest").

of interest "because there are real-life situations in which one does not have to travel very far . . . before encountering [differences in] attitudes." Cain, *supra*, at 39; *see Prosser v. Elections Bd.*, 793 F. Supp. 859, 863 (1992) (per curiam). The world is getting smaller, and communities of interest may legitimately cross street blocks, neighborhoods, and cities in ways that would have been unthinkable just decades ago.

> [T]he focus on geographic proximity in districting developed in a time when communities were smaller and transportation was more difficult. The concept of geographical coherence may be far less relevant in defining primary communities of interest in today's society. The census demographic data reveal a highly fluid society in which changes of residence are far from unexpected, and in which the growth of "exurbs" — defined by proximity to the highway networks — have replaced any pre-existing sense of geographic coherence.

T. Alexander Aleinikoff & Samuel Issacharoff, *Race and Redistricting: Drawing Constitutional Lines after* Shaw v. Reno, 92 Mich. L. Rev. 588, 637 (1993) (internal quotation marks omitted); Paul A. Jargowsky, *Metropolitan Restructuring and Urban Policy*, 8 Stan. L. & Pol'y Rev. 47, 48 (1997) (discussing decentralization of urban areas facilitated by "high-speed, high-volume networked communications").

In addition, the presumed correlation between physical proximity of district residents and ease of access to legislators, *see Prosser*, 793 F. Supp. at 863 ("Compactness and contiguity . . . reduce travel time and costs, and therefore make it easier for candidates . . . to campaign . . . and once elected to maintain close and continuing contact with the people they represent."), may have been valid in the past, but there are fewer reasons to have faith in the connection now.

> The popular concern for compactness . . . is the legacy of earlier periods in history when communications and transportation were difficult. Compactness guaranteed that representatives could meet with their constituents with relative ease . . . . This consideration is not as relevant as it once was. Travel over large and sprawling areas is no longer a formidable task.

Cain, *supra*, at 32; *see* Daniel H. Lowenstein & Jonathan Steinberg, *The Quest for Legislative Districting in the Public Interest: Elusive or Illusory?*, 33 U.C.L.A. L. Rev. 1, 22 (1985).

In sum, courts deciding whether *Shaw I* plaintiffs have produced compelling evidence that a district is not geographically compact should rely on functional measures rather than on aesthetic or physical criteria.[6] In today's world, functional measures do the job that shape was supposed to do —only they do it better. Plaintiffs therefore should not be able to raise an inference of purposeful discrimination with nothing more than evidence of a district's irregular shape. A *prima facie Shaw I* case should require proof that a challenged district fails a functional test for compactness.[7]

---

6. States are not constitutionally required to draw districts that are aesthetically pleasing. *See Vera*, 517 U.S. at 962 (plurality opinion); *Shaw I*, 509 U.S. at 645-46.

7. *See* Bernard Grofman, *Criteria for Districting: A Social Science Perspective*, 33 U.C.L.A. L. Rev. 77, 89 (1985) ("[T]he usefulness of requiring that districts be compact has been vastly overrated."); Cain, *supra*, at 148 (distorted shapes do not necessarily indicate gerrymandering and "the observer has to look closely to see what the intent was").

b. Plaintiffs Should Also Be Required to Present Compelling Evidence That a Challenged District Seriously Distorts the Region's Racial Demographics.

In addition to providing compelling evidence that a district is not functionally compact, a plaintiff seeking to raise a *Shaw I* claim solely on the basis of circumstantial evidence should be required to prove that a challenged district seriously distorts the racial demographics of the region. Where, as here, the challenged district is not majority-minority, that burden should be all the more difficult to meet. Indeed, the fact that a congressional district is not majority-minority might well support a presumption that race did not dominate legislative decision-making. Plaintiffs who could not overcome such a presumption would not establish a *prima facie* case under the framework proposed here.

2. If Plaintiffs Satisfy Their Production Burden, Defendants Must Produce Evidence That Race Was Not the Predominant Motive, with Plaintiffs Retaining the Ultimate Burden of Proving Unconstitutionality.

If plaintiffs were able to meet the difficult burden of raising an inference of *Shaw I* liability, the state would be required to proffer race-neutral reasons for the district's lines. The universe of legitimate rationales is quite large and includes "compactness, contiguity, respect for political subdivisions or communities defined by actual shared interests." *Miller*, 515 U.S. at 916. Producing such evidence would be sufficient to rebut the inference of unconstitutionality established by plaintiffs' evidence and shift the production burden back to plaintiffs. With plaintiffs' and defendants' positions so framed, plaintiffs would then attempt to meet their demanding burden

of proving that racial considerations dominated the districting process.

3. When Plaintiffs Cannot Carry Their Burden of Proof, Courts Should Defer to the Legislature's Line-Drawing Judgments.

If Plaintiffs cannot meet the difficult burden of proving that race was the predominant legislative motive under the framework recommended here, the judiciary must defer to North Carolina's judgments about how best to structure its democracy. A state's ultimate goal in legislative apportionment is to provide effective political representation of the interests of its citizens. In doing so, a state necessarily makes difficult and contested political judgments as to what interests should be represented in Congress, and how.[8] For this reason, "[e]lectoral districting is a most difficult subject for legislatures, and . . . the States must have discretion to exercise the political judgment necessary to balance competing interests." *Miller*, 515 U.S. at 915; *see Davis v. Bandemer*, 478 U.S. 109, 147 (1986) (O'Connor, J., concurring) ("Federal courts will have no alternative but to attempt to recreate the complex process of legislative apportionment in the context of adversary litigation in order to reconcile the competing claims of political, religious,

8. The question of how best to represent the interests of citizens is the subject of considerable and reasonable debate. *See, e.g.*, Keith J. Bybee, *Mistaken Identity: The Supreme Court and the Politics of Minority Representation* 36-50 (1998); Malone, *supra*, at 475-92; Hanna Fenichel Pitkin, *The Concept of Representation* (1967). Thus, members of this Court have criticized judicial interference in matters of legislative apportionment on the ground that it requires courts to make theoretical judgments concerning the nature of political representation — judgments that courts are often ill-equipped to make. *See, e.g., Holder v. Hall*, 512 U.S. 874, 891-903 (1994) (Thomas, J., concurring); *Reynolds v. Sims*, 377 U.S. 533, 589 (1964) (Harlan, J., dissenting); *Wesberry v. Sanders*, 376 U.S. 1, 30 (1964) (Harlan, J., dissenting).

ethnic, racial, occupational, and socioeconomic groups."); Lowenstein & Steinberg, *supra*, at 26-38, 73-75 (congressional districting is inherently political and should be free from excessive judicial interference).[9]

Moreover, judicial interference seems especially inappropriate where, as here, the majority "attempt[s] to enable the minority to participate more effectively in the process of democratic government," *Shaw II*, 517 U.S. at 918 (Stevens, J., dissenting), rather than to exclude minorities from democratic participation. In these cases, there is little reason to believe that democratic processes are being unconstitutionally subverted and thus no need for courts to enter the "political thicket" of legislative apportionment. *Colegrove v. Green*, 328 U.S. 549, 556 (1946).

II.

THE DISTRICT COURT IMPROPERLY RELIEVED PLAINTIFFS OF THEIR DEMANDING BURDEN OF PROOF.

Within the framework recommended here, Plaintiffs failed to make even a *prima facie* showing that race was the

9. Of course, federal law limits the States' districting authority in important ways. *See, e.g., Davis*, 478 U.S. at 113 (holding that claims of partisan gerrymandering are justiciable); *Thornburg v. Gingles*, 478 U.S. 30 (1986) (prohibiting vote dilution); *Baker v. Carr*, 369 U.S. 186 (1962) (requiring equality of district population); *Gomillion*, 364 U.S. at 341 (prohibiting redrawing district lines to intentionally deprive citizens of right to vote on basis of race). But these rules leave the states with considerable leeway. For example, even after application of the "one person one vote" principle, hundreds of districting options remain available to the states. *See* Robert G. Dixon, Jr., *Fair Criteria and Procedures for Establishing Legislative Districts, in Representation and Redistricting Issues* 7-8 (Bernard Grofman et al. eds., 1982).

predominant factor motivating the State's districting decision. Moreover, even assuming that their weak evidence raised an inference of unconstitutionality, North Carolina fully countered that inference with unchallenged evidence that non-racial motives dominated the State's districting process. Given the unrebutted evidence of dominant non-racial motives, the district court should have awarded summary judgment to Defendants. The district court thus clearly erred in granting summary judgment to Plaintiffs.

A. Applying the Appropriate Framework, Plaintiffs Failed to Meet Their Substantial Burden of Demonstrating That Race Was North Carolina's Predominant Purpose in Redistricting.

1. Plaintiffs' Circumstantial Evidence Failed Even to Raise an Inference of Discriminatory Purpose.

In granting summary judgment to Plaintiffs, the district court improperly relied on weak circumstantial evidence of insufficient geographic compactness and distorted demographics. Looking first to demographics, the court found that District Twelve, which is composed of parts of six split counties, received "almost 75 percent" of its population from "three county parts which are a majority African-American in population," while "the other three county parts . . . have narrow corridors which pick up as many African-Americans as are needed for the district to reach its ideal size." *Cromartie v. Hunt*, No. 4:96-CV-104-BO (3) (E.D.N.C. April 14, 1998), Appendix to Jurisdictional Statement ("Appendix") at 6a-7a. The court further found that "the four largest cities assigned to District 12 are split along racial lines." *Id.* at 7a. Moving onto compactness, the district court found that "District 12 has an irregular shape," *id.* at 9a, that the district's dispersion and perimeter compactness measures "are much lower than the mean

compactness indicators for North Carolina[]," *id.* at 11a, and that "it is still the most geographically, (sic) scattered of North Carolina's congressional districts," *id.* at 20a. Also, the count found that the district was "barely contiguous in parts." *Id.* at 9a. Thus the court concluded, on the basis of what it termed the undisputed evidence, that District Twelve, like its predecessor, was "unusually shaped . . . wind[ing] its way from Charlotte to Greensboro along the Interstate-85 corridor, making detours to pick up heavily African-American parts of [other] cities." *Id.* at 19a.

This evidence was plainly insufficient to raise an inference that race was the General Assembly's predominant motivating factor. First of all, District Twelve is a majority-white district: just 46.67% of its total population and 43.36% of its voting age population is black. Surely, if North Carolina was hell-bent on subordinating all other factors to race, it would not have drawn district lines that so reduced the probability of electing a black representative. But even if the Court does not believe that District Twelve's majority-white population is dispositive of the issue of the General Assembly's predominant purpose,

> the fact that all of North Carolina's congressional districts [have a] majority-white [voting-age population] at the very least makes the plaintiffs' burden, which is already quite high, even more onerous.

Id. at 31a (Ervin, J., dissenting); *see Lawyer*, 117 S. Ct. at 2195.

Second, District Twelve is "not so bizarre or unusual in shape" as to raise an inference of racial gerrymandering. *Cromartie*, Appendix at 25a (Ervin, J., dissenting). District

Twelve is among the most functionally compact in North Carolina. It has the third shortest travel time and distance between its farthest points of any district in North Carolina. *See* Affidavit of Dr. Alfred W. Stuart, Appendix at 105a. Also, Interstate-85 forms a major artery of access and communication through the district. And although District Twelve does not score well on tests of dispersion and perimeter compactness, it is fully contiguous and is significantly more compact based on these measures than its predecessor. *See* "An Evaluation of North Carolina's 1998 Congressional District" by Professor Gerald R. Webster ("Webster Report"), Appendix at 127a, 133a.

Thus, Plaintiffs' circumstantial evidence of racial demographics and geographical compactness was insufficient to justify an inference that North Carolina had used race as the predominant factor in drawing district lines. Moreover, as is shown below, any inference of impermissible racial gerrymandering raised by this record was fully rebutted by Defendants' evidence.

2. Defendants Fully Rebutted Any Inference That Race Was the Predominant Factor in the Districting Process.

Even assuming, *arguendo*, that Plaintiffs' circumstantial evidence was sufficient to raise an inference of unconstitutionality, Defendants fully rebutted that inference with unchallenged proof that race was not the predominant consideration in the drawing of District Twelve's boundaries. Inexplicably, the bulk of this evidence was completely ignored by the district court. The Chairmen of both the State House of Representatives' Redistricting Committee and the State Senate's Redistricting Committee submitted affidavits affirming that ensuring a particular racial balance was not the General Assembly's primary motivation in drawing District

Twelve. *See* Affidavit of Senator Roy A. Cooper, III ("Cooper Affidavit"), Appendix at 70a-78a; Affidavit of Representative W. Edwin McMahan ("McMahan Affidavit"), Appendix at 79a-84a. Similarly, North Carolina's submission to the Department of Justice pursuant to section 5 of the Voting Rights Act indicated that the "General Assembly's primary goal in redrawing the plan was to remedy the constitutional defects of the former plan," that is, to ensure that race was *not* the predominant factor. *See* Affidavit of Gary O. Bartlett, ¶ 97C-27N of the Section 5 Submission Commentary ("Bartlett Affidavit"), Appendix at 63a. According to its submission, the General Assembly declined to create a majority-minority Twelfth District because to do so "would artificially group together citizens with disparate and diverging economic, social and cultural interests and needs" and would thereby make "race . . . the predominant factor." *Id.* at 66a. Plaintiffs offered no contrary direct evidence of Defendants' motivations.

In addition, the Defendants offered extensive evidence that the North Carolina General Assembly created District Twelve in order to provide representation to communities of actual shared interests. *See* Bartlett Affidavit, Appendix at 64a; Webster Report, Appendix at 1 (noting "desire to include a requisite number of people with similar social, economic or political orientations" in a single district). States may legitimately consider communities of interests when drawing congressional districts, s*ee Shaw II*, 517 U.S. at 907; *Miller*, 515 U.S. at 919, and North Carolina's reliance on these criteria easily explain District Twelve's shape and demographics.[10]

10. A district providing representation for actual communities of interest will not necessarily be physically compact. *See supra* Point I.C.1.a. In addition, a district's discernible racial character will often be caused by the demonstrated correlations between race and actual communities of interest. *See Vera*, 517 U.S. at 964 (plurality opinion) (Cont'd)

North Carolina explicitly identified three communities of interest that readily explain the shape and racial composition of District Twelve. First, in order to maintain the House delegation's six-six partisan balance, the General Assembly included precincts in District Twelve that had supported democratic candidates in recent elections. *See* Bartlett Affidavit, Appendix at 64a. Maintaining such a balance was necessary to ensure compromise between the Republican-controlled State House of Representatives and the Democrat-controlled State Senate, and this in turn required placing District Twelve's Democratic incumbent (as well as the other eleven incumbents) in "safe" districts. *See* Cooper Affidavit, Appendix at 71a-75a, 77a; McMahan Affidavit, Appendix at 81a-83a; Affidavit of David Peterson, Ph.D., Appendix, at 85a-100a. District Twelve's large black population is thus the result of the voting patterns of black North Carolinians, who overwhelming support Democratic candidates. *See* Michael Barone & Grant Ujifusa, *The Almanac of American Politics 1998*, 1052 (1998).

Though the district court at least acknowledged this evidence, it failed to credit it, relying instead on anecdotal evidence that "the legislators excluded many heavily-Democratic precincts from District 12, even though those precincts immediately border the District." *Cromartie*,

(Cont'd)
("[R]ace [often] correlates strongly with manifestations of community of interest . . . ."); *Abrams*, 117 S. Ct. at 1947 (Breyer, J., dissenting) (noting that rural and urban minorities living near one another may share common interests). In this regard, it is imperative that courts recognize that when a group of minority citizens organizes itself and lobbies a state legislature for representation in Congress, the legislature's assent to that lobbying is properly ascribed to political, rather than racial, motivations. It would be a travesty of the Equal Protection Clause (and the First Amendment) for this Court to prevent racial minorities from organizing and advocating for themselves in the political arena when every other self-defined interest group is permitted to do so.

Appendix at 20a. From this, the court inferred that politics was simply a pretext for race. However, as Judge Ervin noted in dissent:

> This evidence does not take into account . . . that voters often do not vote in accordance with their registered party affiliation. The State has argued, and I see no reason to discredit their uncontroverted assertions, that the district lines were drawn based on votes for Democratic candidates in *actual elections*, rather than the number of registered voters.

Id. at 33a (Ervin, J., dissenting); Cooper Affidavit, Appendix at 73a ("election results [from 1990-1996] were the principal factor"). The decision to rely on voting rather than registration was perfectly legitimate, *see Vera*, 517 U.S. at 968 (plurality opinion), particularly given the documented history of white registered North Carolina Democrats voting Republican to avoid electing black candidates. *See Gingles v. Edmisten*, 590 F. Supp. 345, 367-72 (E.D.N.C. 1984), *aff'd in part and rev'd in part sub nom., Thornburg v. Gingles*, 478 U.S. 30 (1986). By rejecting Defendants' evidence, the district court therefore improperly substituted its judgment for that of the legislature as to the appropriate criterion of partisanship.

Second, the district court completely ignored Defendants' evidence that the General Assembly sought to provide representation to inner-city residents. District Twelve is "a functionally compact, highly urban district drawing together citizens in Charlotte and the cities of the Piedmont Urban Triad." Cooper Affidavit, Appendix at 74a; *see Cromartie*, Appendix at 36a-37a (Ervin, J., dissenting) ("I do not see how anyone can argue that the citizens of, for example, the inner-city of Charlotte do not have more in common with citizens of

the inner-cities of Statesville and Winston-Salem than with their fellow Mecklenburg county citizens who happen to reside in the suburban or rural areas."). A State may reasonably seek to provide effective representation to inner-city urban communities. *See Lawyer*, 117 S. Ct. at 2195; *Vera*, 517 U.S. at 966 (plurality opinion).

Third, the district court failed to consider evidence that North Carolina sought to join in one district the very real community of interests formed by localities abutting Interstate 85, a major line of communication, transportation, and commerce for the culturally distinct Charlotte/Piedmont triad region. In North Carolina, as in other states, residence in proximity to a major transportation artery links people into natural voting constituencies. *See Cromartie*, Appendix at 36a (Ervin, J., dissenting) ("District 12 also was designed to join a clearly defined 'community of interest' that has sprung up among the inner-cities and along the more urban areas abutting the interstate highways that are the backbone of the district."); Webster Report, Appendix at 124a (recognizing appropriateness of "focus[ing] . . . upon major transportation corridors such as freeways"); *Vera*, 517 U.S. at 966 (plurality opinion) (noting that "transportation lines . . . implicate traditional districting principles"). Furthermore, by focusing the district on Interstate 85, the General Assembly fostered ease of access to legislators. *See* Affidavit of Dr. Alfred W. Stuart, Appendix at 105a; Webster Report, Appendix at 125a.

Indeed, this Court in *Abrams*, 117 S. Ct. at 1941, *aff'g*, *Johnson v. Miller*, 922 F. Supp. 1556 (S.D. Ga. 1995), approved the court-drawn Eleventh Congressional District in Georgia, which the lower court had described as "a relatively compact grouping of counties which follow a suburban to rural progression and have Interstate Eighty-Five as a very real connecting cable." *Johnson*, 922 F. Supp. at 1564. Thus, this

Court has previously recognized the legitimate role that Interstate 85 can play in creating communities of interest worthy of representation. If Interstate 85 forms a legitimate locus for the 11.79% black Eleventh District in Georgia, then North Carolina may legitimately determine that the same highway plays a similar role in North Carolina's Twelfth District. Defendants' non-racial explanations therefore fully rebutted whatever inference of discrimination may have been raised by Plaintiffs' weak circumstantial evidence of District Twelve's shape and racial demographics.

B. The District Court Relieved Plaintiffs of Their Difficult Burden of Proof By Relying on Impact, Rather Than Intent, to Find a Constitutional Violation.

Given the weakness of Plaintiffs' circumstantial showing and the overwhelming strength of Defendants' rebuttal, the district court erred in failing to grant summary judgment to Defendants and in granting summary judgment to Plaintiffs. The district court effectively erected a conclusive presumption of purposeful discrimination on the basis of flimsy, completely rebutted circumstantial evidence. For all practical purposes, the district court shifted the burden of proof from Plaintiffs to Defendants and improperly created an impact test for *Shaw I* cases brought by white voters. *But see, e.g., Gomillion*, 364 U.S. at 341 (representing the rare case where the effects of governmental action were so overwhelming that the racial purpose of the action was clear).

Once the proper burden of proof rules are applied, however, it is clear that the district court erred in failing to grant Defendants' motion for summary judgment. Defendants are entitled to summary judgment as a matter of law where, as here, plaintiffs make an insufficient showing on an essential element of their case as to which they bear the burden of proof. *See*

Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986). In opposing a summary judgment motion, plaintiffs may not rest on the pleadings, but must indicate, by affidavits or otherwise, "specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e); *see Celotex*, 477 U.S. at 324; *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). Moreover, plaintiffs may not simply assert the existence of a factual dispute. "If the evidence is merely colorable, or is not significantly probative," summary judgment is appropriate. *Anderson*, 477 U.S. at 249-50 (internal citations omitted).

Furthermore, in considering the sufficiency of plaintiffs' showing, the court "must view the evidence presented through the prism of the substantive evidentiary burden." *Id.* at 254. To successfully oppose a summary judgment motion, plaintiffs who bear a heightened burden of proof at trial must present sufficient evidence to allow a trier of fact to find in their favor under the heightened standard. *See id.* at 252-53; *Miller*, 515 U.S. at 916 (noting that in *Shaw I* actions, courts are directed to consider heightened burden "when assessing . . . the adequacy of a plaintiff's showing at the various stages of litigation and determining whether to permit discovery or trial to proceed") (citing *Celotex*, 477 U.S. at 327).

Applying these standards, Defendants were plainly entitled to a grant of summary judgment. *See Cromartie*, Appendix at 43a (Ervin, J., dissenting). Plaintiffs failed to offer specific and significantly probative evidence sufficient to create a genuine issue of fact as to whether racial considerations dominated the General Assembly's districting decisions to the exclusion of other factors. *See Crawford-el v. Britton*, 118 S. Ct. 1584, 1598 (1998) ("[P]laintiff may not respond [to defendant's summary judgment motion] simply with general attacks upon the defendant's credibility, but rather must identify affirmative evidence from which a jury could find that the plaintiff has

carried his or her burden of proving the pertinent motive."); 10B Wright, Miller & Kane, *Federal Practice & Procedure: Civil 3d* § 2730, at 40-42 (1998) (same). Unlike in every previous case striking down a challenged district under *Shaw I*, Plaintiffs offered, and could offer, no direct evidence that race dominated any legislator's considerations, much less the considerations of the General Assembly as a whole. In contrast, Defendants offered extensive direct evidence that traditional districting criteria were not subordinated to race. In the face of Defendants' unrebutted evidence, Plaintiffs' circumstantial evidence simply could not create a genuine issue of fact as to legislative purpose and therefore could not defeat Defendants' motion for summary judgment. *See Miller*, 515 U.S. at 914 (evidence of discriminatory impact usually insufficient to demonstrate discriminatory purpose, requiring courts to look to other evidence); 10A Wright, Miller, & Kane, *supra*, § 2727, at 470-71, 486-88, 501.

Incredibly, the district court not only failed to award summary judgment to Defendants, it granted Plaintiffs' summary judgment motion. This was manifest error for two reasons. First, the district court applied an improper standard for considering evidence on a motion for summary judgment. "The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." *Anderson*, 477 U.S. at 255; *accord Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 456 (1992). Although Defendants offered extensive evidence conclusively demonstrating that race was not the predominant consideration, the district court ignored most of that evidence. And what evidence the district court did consider, it mischaracterized. *See supra* Point II.A.2.

Second, the district court improperly granted summary judgment to the Plaintiffs on the question of North Carolina's motivations in drawing its congressional districts. In light of

the sworn statements of the Chairmen of the House and Senate Redistricting Committees that race was simply one of many factors guiding the drawing of District Twelve, and given that Plaintiffs offered no direct evidence to the contrary, the court could not legitimately have determined, as a matter of law, that Plaintiffs had conclusively demonstrated that the General Assembly acted with an impermissible purpose. *See White Motor Co. v. United States*, 372 U.S. 253, 259 (1963) (court should be wary of granting summary judgment where dispositive issue requires assessment of state of mind); *Johnson v. Meltzer*, 134 F.3d 1393, 1397-98 (9th Cir. 1998) (same). At a minimum, this Court should remand the case for fact-finding as to whether race was, indeed, the legislature's predominant concern. *See Crawford-el*, 118 S. Ct. at 1597 (credibility assessments are not amenable to resolution on summary judgment); *Agosto v. INS*, 436 U.S. 748, 756 (1978) ("[A] district court generally cannot grant summary judgment based on its assessment of the credibility of the evidence presented.").

By awarding summary judgment to Plaintiffs on the basis of the district's shape and racial demographics despite extensive evidence that its shape and demographics could be explained through North Carolina's application of traditional, race-neutral districting factors, the district court effectively held that *Shaw I* plaintiffs could raise a conclusive presumption of predominant racial purpose solely on the basis of circumstantial evidence. In effect, the district court's decision, if permitted to stand, would premise government liability on the basis of perceived "discriminatory impact," at least for white plaintiffs challenging "too black" districts. The court's ruling was contrary to long-established principles of constitutional law and must be reversed.

CONCLUSION

Amici respectfully urge this court to reverse the judgment below, and to hold that Plaintiffs failed to satisfy their production burden on the issue of whether race was the predominant motive in drawing District Twelve. In the alternative, *amici* ask the Court to vacate the judgment below and remand with instructions that the district court conduct a factual inquiry into North Carolina's predominant purpose. Finally, even if Plaintiffs established as a matter of law that race was the predominant factor in districting, remand still would be necessary to resolve the fact-intensive question whether District Twelve is narrowly tailored to achieve a compelling state interest. *See King v. State Bd. of Elections*, 979 F. Supp. 619, 621-27 (1997) (finding that Illinois' Fourth Congressional District satisfies strict scrutiny), *aff'd mem.*, 118 S. Ct. 877 (1998).

Respectfully submitted,

BURT NEUBORNE
Counsel of Record
DEBORAH GOLDBERG
RICHARD R. BUERY, JR.
BRENNAN CENTER FOR JUSTICE
at New York University School of Law
Attorneys for Amici Curiae
161 Avenue of the Americas
Fifth Floor
New York, New York 10013
(212) 998-6730